



SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 125, 128, and 134

RIN 3245-AH69

Veteran-Owned Small Business and Service-Disabled Veteran-Owned Small Business — Certification

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The Small Business Administration (SBA) amends its regulations to implement a statutory requirement to certify Veteran-Owned Small Business Concerns and Service-Disabled Veteran-Owned Small Business Concerns participating in the Veteran Small Business Certification Program.

DATES: This final rule is effective on January 1, 2023.

FOR FURTHER INFORMATION CONTACT: Timothy Green, U.S. Small Business Administration, Office of Veterans Business Development, 409 Third Street SW, 5th Floor, Washington, DC 20416; (202) 205-6777; Timothy.green@sba.gov. This phone number may also be reached by individuals who are deaf or hard of hearing, or who have speech disabilities, through the Federal Communications Commission's TTY-Based Telecommunications Relay Service teletype service at 711.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Small Business Administration (SBA) amends its regulations to establish a certification program for Veteran-Owned Small Businesses (VOSB) and Service-Disabled Veteran-Owned Small Businesses (SDVOSB) to implement section 862 of the National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283, 128 Stat. 3292 (January 1, 2021) (NDAA 2021).

The Veteran-Owned Small Business and Service-Disabled Veteran-Owned Small Business Programs, set forth in 38 U.S.C. 8127, authorize Federal contracting officers to restrict competition to eligible VOSBs and SDVOSBs for Department of Veterans Affairs (VA) contracts. Previously, to be eligible for VA contracts, VOSBs and SDVOSBs had to be verified by VA's Center for Verification and Evaluation (CVE) in accordance with 38 U.S.C. 8127. There was no Government-wide SDVOSB certification program, and firms seeking to be awarded SDVOSB sole source or set-aside contracts with Federal agencies other than the VA only needed to self-certify their status as set forth in section 36 of the Small Business Act, 15 U.S.C. 657f.

Section 862 of the NDAA 2021 amended the VOSB/SDVOSB requirements to transfer the responsibility for certification of VOSBs and SDVOSBs to SBA as of January 1, 2023 (Transfer Date) and created a certification requirement at SBA for SDVOSBs seeking sole source and set-aside contracts across the Federal Government. Section 862 also created a one-year grace period after the Transfer Date for businesses to file an application for SDVOSB certification with SBA and to continue to self-certify. Self-certified SDVOSBs that apply within the one-year grace period will maintain eligibility until SBA makes a final eligibility decision. With the exception of this grace period, once this rulemaking is finalized, VOSBs and SDVOSBs that are not certified by SBA's Veteran Small Business Certification Program will not be eligible to receive sole source or set-aside VOSB or SDVOSB awards across the Federal Government.

Firms verified by VA's CVE prior to the Transfer Date will be deemed certified by SBA during the time that remains in the firm's three-year term of eligibility. To be recertified by SBA after the Transfer Date, those verified firms will be required to meet all conditions of eligibility as described in SBA's revised regulations. In addition, the Administrator may extend a participant's eligibility period up to one year. To facilitate the transition of those firms already verified by VA's CVE before the Transfer Date with

an eligibility period that expires in the first year of the Program, SBA intends to extend the eligibility of those verified firms for a period up to one year. Firms must continue to meet the VOSB or SDVOSB requirements at all times while certified and may be subject to a program examination or a VOSB or SDVOSB status protest.

SBA will implement the Veteran Small Business Certification Program in a new 13 CFR part 128. Part 128 is organized into the following subparts: Subpart A - Provisions of General Applicability; Subpart B - Eligibility Requirements for the Veteran Small Business Certification Program; Subpart C - Certification of VOSB or SDVOSB Status; Subpart D - Federal Contract Assistance; Subpart E - Protests Concerning VOSB and SDVOSBs; Subpart F - Penalties and Retention of Records; and Subpart G - Surplus Personal Property for VOSB Programs.

As part of the process to draft the regulations governing the Veteran Small Business Certification Program, SBA published a proposed rule in the Federal Register on July 6, 2022 (87 FR 40141). The proposed rule solicited public comments to assist SBA in drafting a final rule to implement the Veteran Small Business Certification Program. SBA received 168 comments from 90 commenters in response to the proposed rule (Regulations.Gov Docket #SBA-2022-0007). SBA has reviewed all input from interested stakeholders while drafting this rule.

SBA received a number of comments requesting that SBA eliminate self-certification entirely. As discussed further below, SBA has considered these comments and decided to implement its proposal to continue allowing self-certification for SDVOSBs at the subcontract level and for purposes of SDVOSB goaling credit. SBA determined that eliminating all forms of self-certification at this time would be contrary to its overarching goal of harmonizing its small business certification programs, which largely allow self-certification for purposes of subcontracts and goaling. Establishing a policy to eliminate self-certification for these purposes could also adversely impact the

implementation of the Veteran Small Business Certification Program. Given the broad implications to the federal small business procurement system, SBA believes a change of this magnitude is outside the scope of this rule. SBA intends to comprehensively review the use of self-certification in its socioeconomic certification programs for goaling and subcontracting purposes with federal government stakeholders and SBA contracting program participants. However, SBA anticipates sunseting these forms of self-certification after five years, through a separate rulemaking.

II. Section-by-Section Analysis

For ease of review, SBA organized its final rule for part 128 “Section-by-Section Analysis” into subparts and sections. Each section has a citation, heading, and the section’s source citation which correspond to either 13 CFR part 125 (SBA’s previous regulations governing the SDVO SBC program) or 38 CFR part 74 (VA’s Veterans Small Business regulations). Sections with no corresponding regulation are marked “New.”

Subpart A - Provisions of General Applicability

Section 128.100 What is the purpose of this part? (New)

As proposed, § 128.100 added a general purpose section for the Veteran Small Business Certification Program with statutory authority for contractual assistance to VOSBs and SDVOSBs. There was no equivalent section in previous SDVOSB regulations at part 125. SBA received no comments on this section. As such, SBA is implementing § 128.100 as proposed.

Section 128.101 What type of assistance is available under this part? (New)

Given the unique nature of VA’s contractual assistance program, SBA proposed to distinguish the differences in contractual assistance available between VOSB/SDVOSB contracts at VA and SDVOSB contracts across the rest of the Federal Government. There was no equivalent section in previous SDVOSB regulations in part 125. SBA received no comments on this section. As such, SBA is implementing

§ 128.101 as proposed to clarify the two types of assistance available to participants in the Veteran Small Business Certification Program.

Section 128.102 What definitions are important in the Veteran Small Business Certification Program? (Former § 125.12 and 38 CFR 74.1)

Proposed § 128.102 consolidated the definitions sections of former 13 CFR 125.12 and 38 CFR 74.1. In general, proposed § 128.102 adopted VA's existing definitions that applied to the verification process, removed duplicate definitions between VA and SBA regulations, removed VA definitions that referenced SBA's definitions at former § 125.12, and eliminated definitions that were no longer applicable to the SBA's new certification program. Former § 125.12 included definitions of the terms "veteran owned small business concern" and "small business concern owned and controlled by service-disabled veterans." SBA proposed to move these definitions into the eligibility section at § 128.200 in subpart B. However, upon review, SBA decided to include definitions of these terms and has added them to § 128.102 in this final rule.

SBA received 1 comment asking SBA to remove the definition of "principal place of business" in § 128.102, as it is no longer relevant to modern recordkeeping. In part 128, the sole reference to "principal place of business" is in § 128.303(b), which requires the participant to retain a copy of the application materials at the principal place of business for inspection during program examinations. SBA agrees with the commenter that this requirement is not relevant to modern recordkeeping practices and serves no practical purpose for the program or applicant. Accordingly, SBA has removed this definition and the requirement at § 128.303(b) to maintain these records at the principal place of business.

In this final rule, SBA adds definitions for the terms "certification database" and "qualifying veteran" to add clarity to the regulations. The final rule provides that the "certification database" is the database of certified VOSBs and SDVOSBs eligible to

participate in the Veteran Small Business Certification Program. The final rule defines “qualifying veteran” to mean a veteran upon which a VOSB’s eligibility is based, or in the case of an SDVOSB, a service-disabled veteran (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) upon which a SDVOSB’s eligibility is based.

Proposed § 128.102 included definitions for the following terms, which have been removed from this final rule: “eligible individual,” “interested party,” “joint venture,” “primary industry classification,” and “unconditional ownership.” The final rule replaces the term “eligible individual” with the term “qualifying veteran,” as explained above. SBA moves the definition of “interested party” in this final rule to part 134, as explained further below. The final rule removes the definition of the term “joint venture” from § 128.102 because it is unnecessary, as § 128.402 describes joint ventures in detail. The final rule also removes the term “primary industry classification” because it is no longer relevant to part 128, as eligibility is based on the qualifying veteran and certification is no longer based on primary industry classification, as explained further below. Finally, the final rule moves the definition of the term “unconditional ownership” from the definitions section to § 128.202, which addresses ownership.

Subpart B - Eligibility Requirements for the Veteran Small Business Certification Program

Section 128.200 What are the requirements a concern must meet to qualify as a VOSB or SDVOSB? (New)

As proposed, this section reflected the separate and distinct eligibility requirements for certification as a VOSB or SDVOSB. Previously, only firms that were small in their primary North American Industry Classification System (NAICS) code were considered eligible for certification as VOSBs or SDVOSBs. Proposed § 128.200 did not require an applicant to be small in its primary industry but instead proposed to

allow an entity to apply for certification if the concern, together with its affiliates, meets the size standard corresponding to any NAICS code under which it currently conducts business activities. This policy is consistent with changes SBA has also proposed making in the WOSB program. *See* 87 FR 55642.

SBA received 4 comments in support of proposed §§ 128.200(a)(1) and 128.200(b)(1), which expanded program eligibility to firms that qualify as small in any NAICS code in which they currently conduct business, and 2 comments that opposed this proposal. One commenter suggested that certified VOSBs and SDVOSBs should be small in all NAICS codes in which they operate and the other commenter suggested that SBA remove “currently conducts business activities” because the commenter believed this requirement would limit opportunities for businesses entering new industries. SBA believes that requiring an applicant to demonstrate that it qualifies as small for any industry under which it currently conducts business is more appropriate than requiring a firm to demonstrate that it qualifies as small under its primary industry classification.

To be eligible for a specific VOSB/SDVOSB contract, a firm must qualify as small under the size standard corresponding to the NAICS code assigned to that contract. Whether a firm qualifies as small under its primary industry classification is not relevant to that determination. SBA believes that the certification process should ensure that an applicant is owned and controlled by one or more veterans or service-disabled veterans, and that it could qualify as a small business for a VOSB/SDVOSB set-aside contract.

However, SBA agrees with the commenter that the language “currently conducts business activities” could be vague or overly restrictive and has amended §§ 128.200(a)(1) and 128.200(b)(1) in this final rule to provide that a VOSB or SDVOSB must be small under the size standard corresponding to at least one NAICS code listed in its SAM profile. This will allow SBA to determine that an applicant is small in at least

one NAICS code by reviewing the firm's SAM profile, without restricting the firm's ability to expand its operations into new industries.

SBA proposed § 128.200(c)(2) to clarify that certification is only required for VOSB/SDVOSB sole source and set-aside awards. Firms that do not apply for certification in the Veteran Small Business Certification Program may continue to self-certify their status, receive contract awards outside the Veteran Small Business Certification Program through open competition or other types of set-asides, and count toward an agency's goals. This approach is consistent with SBA's WOSB and 8(a) BD programs, which allow businesses to self-certify as ED/WOSBs or SDBs for awards that are made outside of those respective programs and for agencies to receive WOSB or SDB credit for such awards. SBA received several comments in opposition to this approach.

With this final rule, SBA follows its statutory mandate to certify VOSB and SDVOSB status for set-aside and sole source awards. The final rule also adopts proposed §128.200 to allow self-certification outside of VOSB and SDVOSB set-aside and sole source awards by prime contractors and subcontractors for goaling purposes, as it does in the 8(a) BD and WOSB programs. While SBA acknowledges the potential issues to implement self-certification for these purposes, it believes that for the time being, applying this treatment equally to the Veteran Small Business Certification Program is appropriate. After comprehensive review of the use of self-certification in socioeconomic certification programs for goaling and subcontracting purposes with federal government stakeholders and SBA contracting program participants, SBA anticipates sunsetting these forms of self-certification after five years, through a separate rulemaking.

Section 128.201 What other eligibility requirements apply for certification as a VOSB or SDVOSB? (Former 38 CFR 74.2(b) through (f))

Proposed § 128.201 generally added conditions of eligibility for certification that were incorporated from existing CVE requirements at 38 CFR 74.2(b) through (f).

However, the proposed rule eliminated consideration of whether an individual who is currently incarcerated, or on parole or probation, owns or controls an applicant concern in determining whether the applicant possesses good character and thus may qualify as a VOSB or SDVOSB. SBA received 6 comments in support of the elimination of incarceration, parole, or probation as eligibility exclusions to the Veteran Small Business Certification Program. Whether an individual involved with the applicant is currently incarcerated, or on parole or probation, is a responsibility issue, and whether a concern possesses the responsibility to perform a contract is a contract-specific issue, not an underlying eligibility issue. SBA views the issues related to whether the concern has the necessary integrity to perform a contract in the same way as it does questions relating to whether the concern has the necessary financial wherewithal, capacity or tenacity, and perseverance to perform a contract. All are responsibility issues determined by a contracting officer relating to a specific contract. The elimination of these eligibility factors will not affect the veteran's obligation to meet the control requirements at § 128.203, at the time of application and to maintain a firm's certification as a VOSB or SDVOSB. Accordingly, SBA did not adopt the VA's eligibility requirement that excludes individuals currently incarcerated, on parole, or on probation.

Instead, SBA proposed that good character review would be limited to ensuring that an applicant or principal was not debarred or suspended. SBA considered a modified good character requirement that could render an applicant ineligible if there were outstanding issues relating to moral turpitude or business integrity but concluded it is an issue of responsibility determined by the contracting officer, as explained above. SBA received 3 comments recommending elimination of the good character requirement altogether. SBA considered the comments and decided to remove the "good character" provision from § 128.201 in the final rule. Since the "good character" analysis was limited to issues of suspension and debarment, this requirement was duplicative, as

suspension and debarment is already addressed in § 128.201(a). Further, "good character" is not a requirement for eligibility to participate in SBA's WOSB or HUBZone programs, and as explained throughout this rule, SBA seeks to make its contracting program regulations as consistent as possible.

The final rule reorganizes paragraph (a) of § 128.201, addressing suspension and debarment, to make several clarifications. The final rule clarifies that if a participant is debarred from federal contracting, SBA will immediately decertify the firm and remove it from the certification database. If a participant is suspended from federal contracting, SBA will propose the firm for decertification.

Section 128.202 Who does SBA consider to own a VOSB or SDVOSB? (Former § 125.13)

Proposed § 128.202 incorporated SBA's ownership requirements at former § 125.13 and revised the section to add references to non-service-disabled veterans. Proposed § 128.202(f) incorporated the requirements of 38 CFR 74.3(b), requiring participants to provide notice of any change of ownership. Proposed § 128.202(f) required participants to notify SBA of a change of ownership and attest to continued eligibility in accordance with proposed § 128.307. SBA received no comment on these proposed regulations and is implementing these sections as proposed. In the final rule, SBA also made several revisions to "Ownership of a corporation" at § 128.202(e) to eliminate duplicative regulations, reduce complexity of the section, and encourage readability.

With this final rule, SBA also adds 128.202(b)(3) as a limited exception to unconditional ownership. With this final rule, SBA does not abandon its previous interpretation of "unconditional ownership" but merely adds a limited exception for a commercially reasonable right of first refusal. Unconditional ownership continues to mean that a qualifying veteran's ownership must be unrestricted. However, SBA believes

that allowing non-qualifying-veterans a commercially reasonable right of first refusal benefits the program by acknowledging that qualifying veterans often partner with non-qualifying-veterans to form VOSBs and SDVOSBs. This approach encourages investment in VOSBs and SDVOSBs, allows non-qualifying-veterans to protect their business investments, and allows more firms to qualify for certification.

Section 128.203 Who does SBA consider to control a VOSB or SDVOSB? (Former § 125.14)

Proposed § 128.203 incorporated SBA's control requirements at former § 125.14 and revised the section to add references to non-service-disabled veterans. SBA previously administered only the SDVOSB self-certification program and former §125.14 did not specifically reference VOSB requirements. To be verified by VA and subsequently certified by SBA after the Transfer Date, VOSBs are required to meet the same control requirements as SDVOSBs per 38 CFR 74.4. SBA did not propose any other changes to SBA's control regulations at former § 125.14.

In the proposed rule, SBA requested comment from the public on whether additional changes to former § 125.14 were necessary. Commenters generally supported uniformity between SBA's regulations at parts 124, 127, and 128, to support reciprocity between SBA's contracting programs. SBA believes uniformity between its small business contracting programs facilitates reciprocity and makes the programs easier to use for participants. As discussed throughout this rule, SBA attempted to achieve uniformity wherever possible. Additionally, SBA received numerous comments on specific topics related to control, including comments regarding franchises, SBA's use of "rebuttable presumptions," and "extraordinary circumstances."

The proposed rule asked for comments on whether SBA should address the eligibility of franchises in the final rule. SBA received 6 comments in support of addressing control issues associated with franchises. SBA considered these comments.

However, to make the control regulations for the Veteran Small Business Certification Program as consistent as possible with the WOSB and 8(a) BD program regulations, SBA has decided not to address franchises specifically in the final rule. Applications from franchisees will be reviewed on a case-by-case basis, in accordance with how those programs evaluate control of franchises. In general, SBA reviews whether the franchisee has the right to profit from its efforts and bears the risk of loss commensurate with ownership.

SBA received 13 comments related to the “rebuttable presumptions” at proposed § 128.203(i). The proposed regulations described a number of rebuttable presumptions of control by a non-qualifying-veteran, including circumstances where the non-veteran: is a former employer; receives the highest compensation; provides critical bonding or financial support; co-locates with another firm in a similar line of business; shares services and resources; and holds required licenses.

SBA has considered the comments received and revised the section (redesignated as § 128.203(h)) to be more consistent with the 8(a) BD program regulations governing control. The 8(a) BD regulations provide a non-exhaustive list of circumstances that may lead to a finding of control by a non-disadvantaged individual. Likewise, this final rule provides a non-exhaustive list of circumstances at § 128.203(h)(2) that may lead to a finding of control by a non-qualifying-veterans. The final rule provides that in certain circumstances, a concern may demonstrate that a non-qualifying-veteran does not control the firm. SBA believes this lighter approach to control balances flexibility for the applicant or participant while maintaining the integrity of the certification process.

In this final rule, SBA has revised § 128.203(i) (proposed § 128.203(k)) to be less restrictive and more consistent with the WOSB and 8(a) BD program regulations governing outside employment and normal business hours. The final rule at § 128.203(i) states that the qualifying veteran cannot engage in outside activities that prevent the

individual from devoting sufficient time and attention to the business concern to control its management and daily operations. Where a qualifying veteran claiming to control a business concern devotes fewer hours to the business than its normal hours of operation, SBA would assume that the individual does not control the business concern, unless the firm provides evidence that the qualifying veteran has ultimate managerial and supervisory control over both the long-term decision making and day-to-day management of the business.

SBA received 1 comment on proposed § 128.203(m) (redesignated at § 128.203(j)), which addressed the exception to control by a non-veteran in “extraordinary circumstances.” SBA’s former regulations at § 125.14(m) stated that SBA would not find that a lack of control exists where a service-disabled veteran does not have the unilateral power and authority to make decisions in certain extraordinary circumstances. “Extraordinary circumstances” were defined at proposed § 128.102 and former § 125.12, as including: adding a new equity stakeholder; dissolution of the company; sale of the company; the merger of the company; and the company declaring bankruptcy. The commenter suggested that SBA add the following to the definition of extraordinary circumstances at § 128.102: “amendments of the bylaws, operating agreement, or other corporate governance documents.” SBA considered this comment but has decided not to expand the list of allowable extraordinary circumstances to include these additional circumstances. However, in the final rule, SBA has clarified that “sale of the company” includes sale of all assets of the company. The final rule also removes the term “extraordinary circumstances” from the definitions section at § 128.102 and instead lists them in the control section of the regulations at § 128.203(j).

Section 128.204 What size standards apply to VOSBs and SDVOSBs? (Former § 125.15)

Proposed § 128.204 included SBA’s size requirements at former § 125.15 and revised the section to incorporate VOSBs. SBA previously administered only the

SDVOSB self-certification program, so former § 125.15 did not specifically reference VOSB requirements. To be verified by VA and subsequently certified by SBA on the Transfer Date, VOSBs are required to meet the same size requirements as SDVOSBs. SBA received 1 comment on proposed § 128.204(a), which established size “at the time of contract offer,” noting that this was inconsistent with SBA’s size requirements at § 121.404(a), which provide that SBA determines the size of a concern “as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer or response which includes price.” In response to this comment, SBA has amended § 128.204 to be consistent with § 121.404. Additionally, to remove any confusion regarding size status at the time of application and the time of offer, SBA reorganized proposed § 124.204 to include a paragraph (a) addressing size at time of application and paragraph (b) addressing size at time of contract offer.

Subpart C - Certification of VOSB or SDVOSB Status

Section 128.300 How is a concern certified as a VOSB or SDVOSB? (Former 38 CFR 74.2)

Proposed § 128.300 included VA’s eligibility requirements at 38 CFR 74.2(a), with revisions to remove references to VA and to reflect SBA’s certification program. SBA’s proposed rule also granted certification based on an applicant’s participation in SBA’s 8(a) Business Development and WOSB/EDWOSB programs. In granting certification for these programs, SBA reviews ownership and control of the applicant to determine eligibility. The ownership and control requirements that apply to disadvantaged individuals for 8(a) certification and those applying to women for WOSB/EDWOSB certification are basically the same as those applying to veterans and service-disabled veterans for the Veteran Small Business Certification Program. An applicant would be required to certify that there are no material changes in its ownership or control since its 8(a) or WOSB certification, and SBA would then accept its previous

determinations that the identified individual owned and controlled the VOSB/SDVOSB applicant. In such cases, SBA would confirm the identified individual's eligibility as a veteran or service-disabled veteran.

SBA received 8 comments to its proposal at § 128.300(b) and (c) to grant reciprocity to participants in SBA's 8(a) BD and WOSB programs that are owned and controlled by one or more veterans, or in the case of an SDVOSB, service-disabled veterans. All 8 comments agreed that reciprocity between SBA's certification programs would create administration efficiencies as well as reduced processing time for applicants. One comment expressed that the success of reciprocity would heavily rely on the uniformity between regulations, where possible.

In this final rule, SBA removed the references to the 8(a) BD Program and the WOSB Program from § 128.300 and moved them to §§ 128.303(b) and 128.303(c). Section 128.303 describes what an applicant must apply to be certified as a VOSB or SDVOSB. Section 128.303(b) provides that 8(a) BD program participants must demonstrate that the disadvantaged individual is a qualifying veteran, provide documentation of its most recent annual review (or of its 8(a) BD program acceptance if it has not yet undergone annual review), and certify that there have been no material changes in its ownership or control. Similarly, section 128.303(c) provides that an ED/WOSB firm must demonstrate that the woman/women upon whom the firm's eligibility is based is a qualifying veteran, provide documentation of its ED/WOSB certification or its most recent annual recertification, and certify that there have been no material changes in its ownership or control.

Section 128.301 Where must an application be filed? (Former § 74.10)

Proposed § 128.301 included VA's requirements at 38 CFR 74.10 for application to CVE, proposed revisions to remove references to VA, and reflected that an applicant

must apply to SBA for certification after the rule is effective. SBA did not receive comment on this section. SBA is implementing § 128.301 as proposed.

Section 128.302 How does SBA process applications for certification? (Former § 74.11)

Proposed § 128.302 included VA's guidelines for application processing by CVE at 38 CFR 74.11. As proposed, this section removed specific processing guidelines in § 128.302(a). SBA also proposed to add an additional sentence at the end of § 128.302(e) to establish SBA's authority to decertify a firm if the firm failed to inform SBA of any changed circumstance in accordance with § 128.306. The regulation at 38 CFR 74.11(e)(1), which requires participants to notify VA of bankruptcy details within 30 days, was incorporated into §§ 128.302(e) and 128.307 to require participants to notify SBA in the event of a bankruptcy filing. SBA received no comment on this section and is implementing § 128.302 as proposed.

Section 128.303 What must a concern submit to apply for VOSB or SDVOSB certification? (Former § 74.12)

Proposed § 128.303 amended VA's documentation requirements at 38 CFR 74.12 for application to CVE. This amendment included general requirements for submission to SBA rather than listing each document individually as with the current VA regulation. As proposed, this section granted certification based on participants in SBA's 8(a) BD and WOSB/EDWOSB programs that are owned and controlled by one or more veterans, or in the case of SDVOSBs, service-disabled veterans. The proposed amendment demonstrated how applicants may submit documentation as evidence of program eligibility. Proposed § 128.303 added paragraphs (d) and (e) to require a concern to provide a full explanation in the case of an applicant that was previously decertified, previously denied certification, or failed to notify SBA of a material change affecting its eligibility.

In terms of demonstrating that an applicant qualifies as a small business, the proposed rule provided that an applicant must demonstrate that it qualifies as small under

the size standard corresponding to any NAICS code under which it currently conducts business activities. The change to this language was discussed above in the discussion of § 128.200. SBA received no comments on this section and is implementing the remainder of § 128.303 as proposed.

Section 128.304 Can an Applicant appeal SBA's initial decision to deny an application?
(Former § 74.13)

Proposed § 128.304 included VA's regulation at 38 CFR 74.13 for a denied application with CVE. Proposed § 128.304(a) established that there is no reconsideration process for denied applications. SBA believes that the appeals process with SBA's Office of Hearings and Appeals (OHA) as outlined in 13 CFR part 134 serves as an adequate substitute for the process of reconsideration. Given that the proposed rule did not permit reconsideration for initial applications, SBA proposed to shorten the reapplication period after denial from 6 months to 90 calendar days.

SBA received several comments requesting clarity on an applicant's due process rights for denials, decertification, and protests to SBA Office of Hearings and Appeals (OHA) in § 128.304, § 128.310, and § 128.500. In response, this final rule amends part 134 so that all elements of the certification process, including appeal rights for denied applicants, terminations, and protests, are addressed.

In addition, the final rule provides that a denial or decertification based on the failure to provide sufficient evidence of the qualifying individual's status as a veteran or a service-disabled veteran is not subject to appeal to OHA. SBA believes it important to include a statement in § 128.304 to address appeals for denials solely based on an individual's status as a veteran or service-disabled veteran. The decision as to whether an individual is a veteran or service-disabled veteran is one outside of SBA's authority and it would not be appropriate for SBA to evaluate this eligibility criteria. It also removes the provisions stating the filing party bears the risk that the delivery method chosen will not

result in timely receipt by OHA and specifying how the decision will be issued, since these requirements would be governed by part 134.

Section 128.305 Can an Applicant or Participant reapply for certification after a denied certification or decertification? (Former 38 CFR 74.14)

Proposed § 128.305 included VA's reapplication requirements contained in 38 CFR 74.14 that the applicant must wait for a period of 90 calendar days after a denial decision before a new application will be processed (proposed § 128.305(a)). SBA received 2 comments in support of the proposed changes at § 128.305. As stated above, SBA's proposed rule adopted the existing VA regulations for reapplication in 38 CFR 74.14 but believes that it is more appropriate to adopt the format of SBA's WOSB regulation at § 127.305 instead. There are no material changes to the substantive requirements at § 128.305, however the format was changed in the interest of creating uniform regulations between programs.

Proposed § 128.305(b) provided that participants may reapply for certification within 120 calendar days prior to the end of their eligibility period and the subsequent eligibility period would be based on the date of the new determination letter. SBA believes that discussing the 120-day recertification window in proposed § 128.305(b) may be confusing to the reader and more appropriate to discuss in § 128.306, which explains how a concern may maintain its VOSB or SDVOSB certification. Accordingly, in this final rule, SBA provides that a participant may recertify within 120 calendar days prior to the end of their eligibility period – to § 128.306(a).

Section 128.306 How does a concern maintain its VOSB or SDVOSB certification? (Former 38 CFR 74.15)

Proposed § 128.306 included VA's three-year program eligibility term and continuing obligation requirements at 38 CFR 74.15, with a provision specifying that a business concern would receive an eligibility term of three years from the date of SBA's

approval letter establishing its VOSB or SDVOSB certified status. Although SBA received comments supporting annual recertification, SBA does not believe that yearly recertification is necessary. SBA wants to ensure that it meets its statutory mandate, but at the same time does not want to impose any unnecessary burden on VOSBs and SDVOSBs.

Proposed paragraphs (e) and (f) of this section included the consequences of a program examination. For organizational purposes, SBA moved these provisions to the section specifically addressing program examinations, § 128.308(c).

SBA received a number of comments in support of SBA's 3-year term of eligibility for the Veteran Small Business Certification Program. Three comments proposed an additional one-year period of eligibility on the Transfer Date for those firms already certified by VA or an additional period of eligibility granted at the discretion of the Administrator or designee. SBA agrees this extension will allow SBA to process the large number of applications it will receive in the first year of the program. An extension will allow SBA to focus on applications from self-certified SDVOSB firms, while not delaying recertifications from firms already participating in VA's program. Accordingly, the final rule provides in § 128.306(d) that the Administrator or designee may extend eligibility up to one year beyond the three-years eligibility period.

Section 128.307 What are a Participant's ongoing obligations to SBA? (Former § 74.3(b))

Proposed § 128.307 included the requirement at 38 CFR 74.3(b) for participants to notify CVE of any change of ownership. The proposed section did not require prior SBA approval of a material change. Sections 36 and 36A of the Small Business Act (15 U.S.C. 657f and 657f-1) "require the periodic recertification" of a firm's status as an eligible VOSB or SDVOSB. As noted above in the discussion of § 128.306, SBA proposed that a VOSB or SDVOSB certification generally last three years. SBA has

interpreted the “periodic recertification” requirement set forth in the Small Business Act to require recertification every three years. SBA received one comment on this section supporting this requirement and is implementing § 128.307 as proposed.

Section 128.308 What is a program examination and what will SBA examine? (Former § 74.20)

Proposed § 128.308 adopted VA’s 38 CFR 74.2(a) verification exam requirements. Proposed § 128.308(a) included a general description of the certification exam and stated that examiners will review a participant’s current eligibility and its eligibility at the time of its application or its most recent size recertification. For the final rule, SBA will remove the reference to the most recent size recertification as it is not applicable to the Veteran Small Business Certification Program. SBA may conduct a program examination at any time after the application.

Proposed § 128.308(b) stated that SBA may conduct the program examination at one or all of the participant's offices or work sites, to be determined by SBA. SBA received 1 comment requesting that SBA conduct virtual program examinations rather than in-person visits. SBA has removed the language referencing physical site visits from § 128.308(b), allowing SBA to conduct either virtual or on-site visits, as appropriate.

Section 128.309 What are the ways a Participant may exit the Veteran Small Business Certification Program? (Former § 74.21)

Proposed § 128.309 included VA’s guidelines on exiting the CVE program at 38 CFR 74.21. The proposed section included a paragraph providing that failure to recertify would be a basis on which to remove a firm from the Veteran Small Business Certification Program. With the final rule, SBA organized the ways a participant could exit the program into four categories: voluntary withdrawal, decertification by SBA through the proposed decertification process, decertification due to adverse protest findings, and decertification due to suspension or debarment.

SBA received one comment on § 128.309 recommending that SBA include misrepresentation and false statements as a basis for decertification from the program. The commenter suggested that if decertified or denied certification on this basis, such decertified firms or denied applicants should have appeal rights to OHA. The commenter also suggested that if a representative of an applicant or participant submits a false statement, SBA should take steps to bar that representative from participation in SBA contracting programs. SBA agrees but believes that for organizational purposes, these requirements are more appropriate for inclusion in the additional eligibility requirements at §128.201(b).

Section 128.310 What are the procedures for decertification? (Former § 74.22)

Proposed § 128.310 included VA's 38 CFR 74.22 guidelines on canceling program participation by the agency. SBA did not receive relevant comments on this section and has implemented this section as proposed with only minor modifications to improve clarity.

Subpart D — Federal Contract Assistance

Section 128.400 What are VOSB and SDVOSB contracts? (Former § 125.17)

As proposed, § 128.400(a) changed the text in former § 125.17 to reflect VA's authority to award set-aside and sole source to VOSBs and SDVOSBs. Proposed § 128.400(a) referenced the VA Acquisition Regulation (VAAR) at chapter 8 of title 48, Code of Federal Regulations. In the final rule, SBA clarified in § 128.400(a) that VOSB contracts are exclusively VA procurements, including prime contracts and subcontracts for which the VA is the procuring agency.

Proposed § 128.400(b) distinguished VA contracts from SDVOSB contracts with the rest of the Federal Government. SBA received no relevant comments on this section.

Section 128.401 What requirements must a VOSB or SDVOSB meet to submit an offer on a contract? (Former § 125.18)

Proposed § 128.401(a) changed the requirements at former § 125.18(a), which required self-certification of SDVOSB status at the time of offer, to require a concern to be certified as a VOSB or SDVOSB to be eligible for a VOSB or SDVOSB set-aside or sole source contract. The proposed rule also included provisions to allow an uncertified VOSB or SDVOSB to submit an offer while their application is pending with SBA. In the proposed rule, SBA explained that it intended to prioritize those applications where the contracting officer has identified the applicant as the apparent successful offeror. SBA received 2 comments asking SBA to remove this priority review. The commenters did not support allowing uncertified firms to submit an offer while their application is pending. The commenters believed that this procedure would result in wasted time and resources for SBA, the contracting activity, and all impacted bidders. They stated it would introduce a source of delay in the award process because contracting officers would be required to wait for the apparent awardee to be certified and the apparent awardee could end up not being eligible for certification. In addition, VA's existing regulations require offerors to be certified at the time of offer. Based on the comments received, SBA has opted to revise §128.401(a) in this final rule to require SDVOSBs and VOSBs to be certified at the time of offer, subject to the grace period required by NDAA 2021.

Proposed § 128.401(b) added eligibility for VOSB joint ventures and referenced § 128.402, which addressed the joint venture requirements for both VOSBs and SDVOSBs. The remainder of proposed § 128.401 described the requirements applicable to VOSB and SDVOSB contracts, including: compliance with the non-manufacturer rule at § 121.406(b)(1); requirements for Multiple Award Contracts; contract-level recertification requirements; compliance with the limitations on subcontracting at § 125.6; and treatment of an "ostensible subcontractor." These requirements are consistent with the requirements applicable to SBA's other small business contracting programs. SBA did not receive relevant comments on these provisions and has generally

implemented them as proposed, with only minor modifications intended to add clarity to the regulations.

Section 128.402 When may a joint venture submit an offer on a VOSB or SDVOSB contract? (Former § 125.18(b))

SBA proposed a stand-alone section at § 128.402 to describe the joint venture requirements applicable to VOSBs and SDVOSBs. As proposed, SBA did not require SDVOSB joint ventures to be certified to be eligible for non-VA contracts. SBA received 1 comment asking SBA to require certification for all joint ventures. With the exception of 8(a) BD sole source contracts, SBA does not require certification of joint ventures in its certification programs and SBA is seeking to create uniformity among its programs wherever possible. Accordingly, in this final rule, SBA has removed the requirement that VOSB joint ventures be certified.

The proposed rule included a provision at § 128.402(b)(10) providing that a VOSB or SDVOSB participant cannot be a joint venture partner on more than one joint venture that submits an offer for a specific VOSB or SDVOSB contract. Procuring agencies and small businesses have raised concerns to SBA in the context of multiple award contracts where it is possible that one firm could be a member of several joint ventures that receive contracts. In such a situation, several agencies were troubled that orders under the Multiple Award Contract may not be fairly competed if one firm was part of two or more quotes. They believed that one firm having access to pricing information for several quotes could skew the pricing received for the order. SBA received 1 comment in support of proposed § 128.402(b)(10). To make this requirement more prominent within the section and to be more consistent with corresponding changes that have been proposed for SBA's other certification programs (*see* 87 FR 55642), SBA has moved it to § 128.402(a)(3).

In addition, the final rule revises the organization of this section to more closely match the corresponding sections governing joint ventures for SBA's other contracting programs. The final rule also clarifies that where § 128.402 references the requirements of a VOSB or SDVOSB joint venture partner for eligibility purposes, the VOSB or SDVOSB status of that joint venture partner must correspond with the type of award (e.g., to be eligible for a SDVOSB contract, a SDVOSB joint venture partner must be the managing venturer of the joint venture).

Sections 128.403 through 128.408 (Former §§ 125.21 through 125.26)

Proposed §§ 128.403 (former §125.21, addressing requirements not available as VOSB or SDVOSB contracts), 128.405 (former § 125.23, addressing sole source contracts), and 128.406 (former § 125.24, addressing VOSB or SDVOSB contracts at or below the simplified acquisition threshold) generally mirrored SBA's former requirements but distinguished VA procurements from all other procurements, where necessary.

Proposed § 128.403 provided that VA procurements are governed by the VAAR and that for non-VA SDVOSB procurements, a contracting activity was limited in which procurements could be made available as SDVOSB contracts based on the requirements of 18 U.S.C. 4124 or 4125 (awards to Federal Prison Industries, Inc.), 41 U.S.C. 8501 (awards to Javits-Wagner-O'Day Act participating non-profit agencies for the blind and severely disabled), and the procurement's current acceptance in 8(a) BD program. SBA did not receive any comments on this section and is implementing it as proposed.

Proposed § 128.404(d) added a requirement to SBA's existing regulations, prohibiting agencies from requiring one or more certifications in addition to its VOSB/SDVOSB certification. SBA has consistently interpreted the authority in the Small Business Act for socioeconomic set-asides to prohibit an agency from requiring multiple certifications (i.e., SDVOSB, 8(a), HUBZone, WOSB). This policy is already

reflected in SBA's regulations at § 125.2(e)(6)(i) with respect to set-aside orders under multiple award contracts, and SBA is in the process of amending its 8(a), HUBZone, and WOSB regulations to reflect this policy as well. *See* 87 FR 55642. Accordingly, SBA is implementing this provision as proposed.

Proposed § 128.407 incorporated the provision at former § 125.25, permitting the SBA Administrator to appeal a contracting officer's decision not to make a particular requirement available for award as an SDVOSB sole source or a SDVOSB set-aside contract. SBA received no comments on this section and adopts it as proposed.

Proposed § 128.408 incorporated the requirements at former § 125.26, describing the procedures applicable to the Administrator's appeal authority provided in former § 125.25. SBA received no comments on this section and adopts it as proposed.

Subpart E - Protests Concerning VOSBs and SDVOSBs

Section 128.500 What are the requirements for filing a VOSB or SDVOSB status protest?

(New)

Proposed § 128.500 addressed status protests for VOSBs and SDVOSBs. Prior to this final rule, SBA's Director of Government Contracting processed all status protests of self-certified SDVOSBs for non-VA contracts in accordance with 13 CFR part 125, and SBA's OHA heard all challenges to a VOSB or SDVOSB's inclusion in the VA database in accordance with 38 U.S.C. 8127(f)(6)(B)(i). However, NDAA 2021 transferred the entirety of 38 U.S.C. 8127(f) to 15 U.S.C. 657f and authorized OHA to decide all status protests of VOSBs and SDVOSBs, regardless of the procuring agency. Accordingly, proposed part 128 did not include the SDVOSB status protest requirements described in former §§ 125.27 through 125.31. Proposed § 128.500(a) provided that OHA would hear protests challenging a VOSB or SDVOSB's inclusion in the certification database based on the status of the concern as a small business concern or the ownership or control of the

concern, in accordance with part 134. Proposed § 128.500(b) clarified that there were separate procedures for size protests and status protests.

The final rule adds paragraph (c), which provides that when challenging the SDVOSB status of a joint venture, the managing SDVOSB party to the joint venture must be a certified SDVOSB as of the date of the joint venture's initial offer, including price, for the SDVOSB contract and compliance with the joint venture agreement requirements set forth in § 128.402(c) is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding.

Subpart F - Penalties and Retention of Records

Proposed §§ 128.600 and 128.601 adopted SBA's regulations at former §§ 125.32 and 125.33 and revised these sections to add references to VOSBs. SBA received no comments on these sections. SBA is implementing § 128.600 as proposed. In this final rule, SBA has deleted proposed § 128.601, because SBA believes it was unnecessary and potentially confusing, given the new requirements for firms to be certified to receive VOSB and SDVOSB contracts.

Subpart G - Surplus Personal Property for Veteran-Owned Small Business Programs

Section 128.700 How does a VOSB obtain Federal surplus personal property? (Former § 125.100)

The Veterans Small Business Enhancement Act provides that VOSBs should be considered for surplus personal property distributions. Those firms seeking to participate in the program are required to be verified by VA's CVE as a condition of eligibility. Proposed § 128.700(a)(1) reflected the transfer of certification to SBA as mandated by NDAA 2021. SBA did not receive any comments on this section and is implementing § 128.700 as proposed.

Parts 121, 125, and 134

This final rule amends references to the current SDVOSB program in part 121. These amendments correspond to the new part 128.

SBA amends the definition of “similarly situated entity” in § 125.1 to clarify that a subcontractor must be certified as VOSB or SDVOSB in order to qualify as a similarly situated entity for purposes of complying with the limitations on subcontracting. The final rule also amends § 125.6(a) to clarify that the limitations on subcontracting apply to VOSB contracts. The VA statute at 38 U.S.C. 8127(k) provides that the limitations on subcontracting in section 46 of the Small Business Act (15 U.S.C. 657s), including the definition of the term “similarly situated entity,” “shall apply with respect to a small business concern owned and controlled by veterans that is awarded a contract under this section.” These amendments are meant to ensure that SBA’s regulations are consistent with this statutory provision.

SBA also amends 13 CFR part 125 to remove the SDVOSB regulations in subparts A through F, consisting of §§ 125.12 through 125.100.

SBA amends part 134 to reflect updated OHA appeal and protest procedures in accordance with NDAA 2021, which transferred the entirety of 38 U.S.C. 8127(f) to 15 U.S.C. 657f and authorized OHA to decide all status protests of VOSBs and SDVOSBs, regardless of the procuring agency, and to decide all challenges to inclusion in the SBA certification database. In the proposed rule, SBA stated that revisions to part 134 would likely occur through a separate direct final rule. In response to this statement, one commenter strongly urged SBA to include amendments to part 134 in the final rule to clarify OHA’s role in deciding all VOSB and SDVOSB status protests per NDAA 2021. SBA agrees with this comment and believes there is good cause to include amendments to part 134 in this rule because the revisions reflect statutory requirements and do not substantially alter the existing processes used by OHA. In the interest of efficiency and

continuity, SBA chooses to revise part 134 in this final rule rather than through a separate rulemaking.

The final rule amends § 134.102, the rules for establishing OHA's jurisdiction, to remove paragraph (q), and to revise paragraphs (u) and (v). Previous paragraph (q) applied to appeals from the SDVOSB protests decided under part 125 and was deleted because it is now obsolete. Revised § 134.102(u) addresses protests of eligibility for inclusion in the Veteran Small Business Certification Program, and revised § 134.102(v) addresses appeals of denials of certification in and decertification from the Veteran Small Business Certification Program.

The final rule amends § 134.201, governing the scope the rules of Subpart B of part 134, by removing paragraph (b)(3) and revising paragraphs (b)(8) and (b)(9). Revised § 134.201(b)(8) provides that the rules of practice for protests of eligibility for inclusion in the Veteran Small Business Certification Program are in subpart J of part 134; revised § 134.201(b)(9) provides that the rules of practice for appeals of denials and cancellations of certification for inclusion in the Veteran Small Business Certification Program are in subpart K of part 134.

The final rule deletes subpart E of part 134, which applied to appeals from the SDVOSB protests decided under part 125, because it is now obsolete.

Finally, the final rule revises subparts J and K of part 134 to reflect the transfer of authority for certifying VOSBs and SDVOSBs from VA to SBA. As stated above, revised subpart J addresses protests of eligibility for inclusion in the Veteran Small Business Certification Program, and revised subpart K addresses appeals of denials and cancellations of certification for inclusion in the Veteran Small Business Certification Program.

III. Compliance with Executive Orders 12866, 12988, 13132, 13175, 13563, the Congressional Review Act (5 U.S.C. 801–808), the Paperwork Reduction Act (44 U.S.C., Ch. 35), and the Regulatory Flexibility Act
Executive Order 12866

The Office of Management and Budget (OMB) has determined that this final rule is a significant regulatory action for the purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis.

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

This rulemaking is necessary to satisfy statutory requirements to implement section 862 of the National Defense Authorization Act for Fiscal Year 2021 amendments to the Small Business Act which requires SBA to certify VOSBs and SDVOSBs.

2. What is the baseline, and the incremental benefits and costs of this regulatory action?

OMB directs agencies to establish an appropriate baseline to evaluate any benefits, costs, or transfer impacts of regulatory actions and alternative approaches considered. The baseline should represent the agency's best assessment of what the world would look like absent the regulatory action. For a regulatory action that modifies or replaces an existing regulation, a baseline assuming no change to the regulation generally provides an appropriate benchmark for evaluating benefits, costs, or transfer impacts of proposed regulatory changes and their alternatives.

Baseline

Section 862 of NDAA 2021 amended sections 36 and 36A of the Small Business Act to require SBA to certify the status of VOSBs and SDVOSBs seeking sole source and set-aside contracts across the Federal Government. This regulation is intended to replace VA's existing regulations governing the verification of VOSBs and SDVOSBs

for sole source or set-aside contracts awarded by VA. Prior to NDAA 2021, SDVOSB firms seeking to contract with Federal agencies other than VA only needed to self-certify their status. SDVOSB firms self-certified on the Transfer Date must apply within a one-year grace period after the Transfer Date.

This final rule will not add any additional burden to current participants in VA's VIP Verification Program. The VIP Verification Program has a three-year term of eligibility and to enter the program, applicants submit an online application with documents supporting the application. To remain in the program, VA requires participants to notify the agency of a change in circumstances such as a change in ownership or control of the firm. VA also requires participants to undergo a program examination to verify the accuracy of any statement or information provided as part of the verification application process. At the end of the three-year term of eligibility, a participant must reapply to the program using the same procedures as the initial application.

This final rule will institute the same process of initial application, program examination, and recertification at the end of the applicant's three-year term of eligibility. Firms verified by VA prior to the Transfer Date will be deemed eligible by SBA for the time that remains in the firm's three-year term of eligibility. To remain certified by SBA after the Transfer Date, those verified firms will be required to meet all conditions of eligibility as described in the regulations such as program examinations and recertification at the end of the firm's term of eligibility. Current participants in the VIP Verification Program would have no additional cost burden associated with SBA's regulations implementing the Veteran Small Business Certification Program. VA existing regulations for VOSBs and SDVOSBs that contract solely with the VA serve as an appropriate benchmark for this regulatory impact analysis. Accordingly, this analysis will

focus on the benefits and costs to those previously self-certified SDVOSBs that would be required to certify with SBA.

Benefit

The benefit of the final regulation is a reduction in the ambiguity and uncertainty for contracting officers in the process of making Federal contract awards to eligible SDVOSB firms that were previously only required to self-certify. Under the existing system for agencies outside of VA, the burden of SDVOSB eligibility compliance is placed upon the awarding contracting officer. Contracting officers must review the documentation of the apparent successful offeror on a SDVOSB contract. Under this final rule, the burden is placed upon SBA. All a contracting officer needs to do is to confirm that the firm is in fact a certified SDVOSB in SBA's certification database and a responsible contractor. A contracting officer would not have to look at any documentation provided by a firm or prepare any internal memorandum memorializing any review. This will encourage more contracting officers to set aside opportunities for Veteran Small Business Certification Program participants as the validation process will be controlled by SBA in the System for Award Management (SAM), the Dynamic Small Business Search (DSBS) database, and SBA's certification database. The reduced responsibility to verify eligibility at contract award may also result in a minor cost savings to the contracting agencies.

Cost

While current participants in the Vet VIP Verification Program would have no additional costs associated with this final rule, SBA anticipates costs associated with self-certified SDVOSBs currently seeking contracts with the rest of the Federal Government. Previously, those firms only needed to self-certify their status to pursue SDVOSB sole source and set-asides. With NDAA 2021, those firms must apply to SBA for certification within a one-year grace period ending on January 1, 2024. Eligible SDVOSB firms that

are certified by SBA after the Transfer Date will then be required to meet all program eligibility requirements going forward to include: notify SBA of a change in circumstances, undergo a program examination, and reapply for certification at the end of their eligibility period.

To estimate the number of SDVOSB applicants within the first year of the certification, SBA reviewed firms actively registered as SDVOSBs in SAM. SBA believes that the number of firms listed in SAM is the most recent and reliable data to estimate participation and total costs of the Veteran Small Business Certification Program for the purposes of this regulatory impact study. Registration in SAM is required for all businesses seeking to contract with the Federal Government, registrants may select to represent themselves as SDVOSBs without going through a certification process, and firms must recertify their registration one-year after initial SAM registration. While it is not anticipated that every firm registered as an SDVOSB in SAM will apply for certification within the first year of the Veteran Small Business Certification Program, SAM registrations serve as what SBA would consider the maximum number of firms that would likely seek certification.

Accordingly, SBA estimates that as many as 21,468 self-certified SDVOSBs could apply for initial certification within the first year of the program. This estimate is based on 32,284 SDVOSB firms registered in SAM and excludes 10,816 firms registered in SAM but already verified by VA as of December 2021.

SDVOSBs Registered in SAM	32,284
Less: VA-Verified SDVOSBs Included in SAM	10,635

Self-Certified SDVOSBs	21,649
Less: VA-Verified VOSBs Self-Certified as SDVOSBs	181
Self-Certified SDVOSBs Anticipated to Seek SBA Certification	21,468

Although the table above represents the entire population of self-certified SDVOSBs, SBA does not believe all 21,468 firms will apply for certification in the first year. To estimate the total participation in the first year, SBA used 17,174 total firms or 80% of the total self-certified SDVOSBs in SAM as a basis for determining program costs. The following table represents the estimated total number of program participant actions during the first five years of the Veteran Small Business Certification Program.

Number of Program Participants				
Year	Initial applications	Program Examinations	Recertifications	Yearly Totals
1	17,174	1,025	2,114	19,288
2	8,500	560	2,006	10,506
3	7,500	420	527	8,027
4	7,500	810	7,715	15,215
5	7,500	635	4,202	11,706
Totals	48,174	3,455	16,565	64,739

For the purposes of this final rule, SBA estimated “time to complete” for three types of certification actions: initial application, program examination, and recertification at the end of the eligibility period. For the initial application, SBA estimates that applicants will complete the application process in 1 hour, a program examination in 1 hour, and recertification in 1 hour. The estimated time to complete includes entering information into SBA’s online application platform and submission of supporting documentation to prove eligibility. It also assumes that the information requested by SBA during initial certification is already held by the firms during the ordinary course of business, was previously required to self-certify, and requires minimum preparation prior to submission. Similarly, participants will be minimally burdened during program examinations and recertifications. During their period of eligibility, participants are required to review, maintain, and update documentation submitted to SBA during initial certification. In the event of a change in circumstances while in the program, participants will have previously notified SBA of the change and already uploaded documentation to support eligibility. SBA’s final rule does not require additional information or documents that the firm would not already have on hand and does not impose additional burdens on the participant. SBA received one comment stating that SBA’s estimate for the time burden for applicants was lower than the actual time it would take, due to system issues and document submission requirements. SBA does not anticipate having system issues and intends to make the document submission requirements clear on the application platform, to allow applicants to be able to complete the process within one hour. Additionally, SBA plans to offer training courses and materials prior to application so that applicants are familiar with the process and documents required for submission.

Hourly cost to the participant is based on the estimated manager’s salary of \$93.44/hour (based on the median hourly wage of \$46.72 for construction managers, according to the BLS 2020 Occupational Outlook Handbook, plus 100% for benefits and

overhead). Based on an estimate of 1 hour per program action and an hourly cost of \$93.44, the five-year total cost burden will be \$6,372,062. SBA estimates that an applicant's cost burden to apply and maintain eligibility for this program would require 3 total hours at a cost burden of \$280.32 per applicant.

Costs to Participants				
Year	Initial applications	Program Examinations	Recertifications	Yearly Totals
1	\$1,604,776	\$95,776	\$197,532	\$1,898,084
2	\$794,240	\$52,326	\$187,441	\$1,034,007
3	\$700,800	\$39,712	\$49,243	\$789,755
4	\$700,800	\$75,686	\$720,923	\$1,497,410
5	\$700,800	\$59,334	\$392,672	\$1,152,807
Totals	\$4,501,416	\$322,835	\$1,547,811	\$6,372,062

SBA believes that participants will not incur any start-up costs, operation or maintenance costs, service costs, or require additional capital as a result of this final rule because there should be no cost in setting up or maintaining systems to collect the required information. As stated previously, the information requested should be collected and retained by the applicant in the ordinary course of business.

SBA estimates the cost to the government of implementing the certification program to be \$30M across fiscal year FY2022 and FY2023 and approximately \$20M annually thereafter. SBA worked with VA and OMB to secure a \$10M transfer from

VA's Supply Fund to cover transition costs, including tech system development. An additional \$20M was requested in the President's Budget for FY2023 for year one program operations. SBA and VA anticipate an up to 250% surge in application volume relative to VA's current volume. The increase in volume will be handled primarily by surging contract support. SBA's \$20M request includes \$2.5M for full time equivalents (FTEs) (current salaries and expenses (S&E) for VA FTEs assigned to the program), \$1.35M for information technology (IT) overhead (system maintenance and standard IT services for staff and contractors), and \$16M in contract costs (based on FY2021 VA contract costs scaled to account for application surge and projected efficiencies). The cost of operating the program may decrease after the initial application surge but would rise every third year when the 2023 cohort is up for recertification. This cost estimate also eliminates CVE's costs of administering the program. CVE reported a cost of \$12,302,497 for 14,762 cases in FY2021. This cost is not directly comparable to SBA's estimate, however, because it excludes items like some support costs, that are included in SBA's cost estimate.

3. What are the alternatives to this rulemaking?

This final rule implements specific statutory provisions in Section 862 of the 2021 NDAA. There are no alternatives that would meet the statutory requirements.

Executive Order 12988

This final rule meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

This final rule does not have federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and

responsibilities among the various levels of government, as specified in the Executive order. As such it does not warrant the preparation of a federalism assessment.

Executive Order 13175

This final rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Executive Order 13563

This Executive order directs agencies to, among other things: (a) afford the public a meaningful opportunity to comment through the internet on proposed regulations, with a comment period that should generally consist of not less than 60 days; (b) provide for an “open exchange” of information among government officials, experts, stakeholders, and the public; and (c) seek the views of those who are likely to be affected by the rulemaking, even before issuing a notice of proposed rulemaking. As far as practicable or relevant, SBA considered these requirements in developing this rule, as discussed below.

1. Did the agency use the best available techniques to quantify anticipated present and future costs when responding to E.O. 12866 (e.g., identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes)?

To the extent possible, the agency utilized the most recent data available in the Federal Procurement Data System-Next Generation, SAM, and VA’s VIP database.

2. Public participation: Did the agency: (a) Afford the public a meaningful opportunity to comment through the internet on any proposed regulation, with a comment period that should generally consist of not less than 60 days; (b) provide for an “open exchange” of information among Government officials,

experts, stakeholders, and the public; (c) provide timely online access to the rulemaking docket on Regulations.gov; and (d) seek the views of those who are likely to be affected by rulemaking, even before issuing a notice of proposed rulemaking?

SBA published a proposed rule in the Federal Register on July 6, 2022 (87 FR 40141). The proposed rule solicited public comments to assist SBA in drafting a final rule to implement a Veteran Small Business Certification Program. SBA received 168 comments from 90 commenters in response to the proposed rule (Regulations.Gov Docket #SBA-2022-0007). SBA has reviewed all input from interested stakeholders while drafting this rule.

3. Flexibility: Did the agency identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public?

This rulemaking is necessary to satisfy statutory requirements to implement section 862 of the NDAA 2021. A description of the need for this regulatory action and the benefits and costs associated with this action, including possible distributional impacts that relate to Executive Order 13563, are included above in the Regulatory Impact Analysis under Executive Order 12866.

Congressional Review Act (5 U.S.C. 801–808)

The Congressional Review Act, 5 U.S.C. § 801 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a “major rule” may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. SBA will submit a report containing this rulemaking and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days

after it is published in the *Federal Register*. This rulemaking has been reviewed and determined by OMB not to be a “major rule” under 5 U.S.C. 804(2).

Paperwork Reduction Act, 44 U.S.C. Ch. 35

In carrying out its statutory mandate to certify VOSB and SDVOSB firms, SBA intends to collect information from VOSB and SDVOSB applicants or participants through an online application system. This collection of information will require submission or retention of documents that support the applicant's certification and continued eligibility.

SBA intends to implement a certification and information collection platform that replicates the VA CVE's currently approved information collection (OMB Control Number 2900-0675). In other words, the information collected by SBA will include eligibility documents previously collected by VA. SBA does not anticipate that these changes would impact the content of the information currently collected or add additional burden to what is currently required by VA for verification.

As discussed above, this final rule will fully implement the statutory requirement for small business concerns to be certified by SBA in order to be awarded a set-aside or sole source contract under the Veteran Small Business Certification Program. As a result of these changes, the final rule eliminates SDVOSB self-certification and sets the standards for certification by SBA. SBA anticipates that these changes will impact self-certified firms; however, this impact would be minimal as this information is already held by applicants during the ordinary course of business, was previously required for self-certification, and would require minimum preparation prior to submission.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, requires an agency to consider the potential economic impact that a draft regulatory action may have on small entities. Agencies must prepare an initial RFA (IRFA) for any proposed rulemakings and

a final RFA (FRFA) for final rulemakings when such rulemakings are subject to notice and comment procedures under section 553(b) of the Administrative Procedure Act.

Section 605 of the RFA permits an agency to forgo such analyses by certifying a draft rulemaking that is not expected to have a significant economic impact or not expected to impact a substantial number of small entities. Generally, an agency's certification must include a statement providing the factual basis for this determination, such as a description of the affected entities and an estimate of the cost of the impacts that justify the "no impact" certification.

SBA, hereby, certifies to the Chief Counsel of Advocacy of SBA and others that the instant final rulemaking will not have a significant economic impact on a substantial number of small entities. SBA previously certified that the instant rulemaking would likely not have a significant economic impact on a substantial number of small entities. *See* 87 Fed. Reg. 40141, 40150. SBA did not receive any comments during the public comment period disputing this certification. Immediately below, SBA sets forth the factual basis for this final certification by addressing the following questions: (1) What are the reasons for and objectives of the rule?; (2) What are SBA's description and estimate of the number of small businesses to which the rule will apply?; (3) What are the projected reporting, recordkeeping, and other compliance requirements of the rule?; (4) What are the relevant Federal rules that may duplicate, overlap, or conflict with the rule?; and (5) What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small businesses?

1. What are the reasons for and objective of the rule?

This final rulemaking is necessary to satisfy statutory requirements to implement Section 862 of the National Defense Authorization Act for Fiscal Year 2021 amendments to the Small Business Act, which require the transfer and consolidation of VOSB and SDVOSB certification operations to SBA. Section 862 of NDAA 2021 amends sections

36 and 36A of the Small Business Act to require SBA to certify the status of VOSBs and SDVOSBs seeking sole source and set-aside contracts across the Federal Government. This final rulemaking intends to replace VA's existing regulations governing the verification of VOSBs and SDVOSBs for sole source or set-aside contracts awarded by VA. Prior to NDAA 2021, SDVOSB firms seeking to contract with Federal agencies other than VA only needed to self-certify their status. SDVOSB firms that have self-certified on the Transfer Date, described herein, must apply within a one-year grace period after the Transfer Date for certification by SBA.

2. What are SBA's description and estimate of the number of small businesses to which the rule will apply?

This final rulemaking will not have a significant economic impact on a substantial number of small entities. The instant rulemaking adds no additional burden to current participants in VA's VIP Verification Program, as the requirements for the new SBA certification program will be nearly identical to those of VA. The only change in this rule affecting small businesses is the requirement that is specific to SDVOSBs, wherein SDVOSBs must apply to SBA for certification for set-aside and sole source awards. Before this rulemaking, there has been no Government-wide SDVOSB certification program. Firms seeking sole source or set-aside contracts with Federal agencies other than the VA only needed to self-certify as SDVOSBs.

To estimate the number of SDVOSB applicants within the first year of the certification, SBA reviewed firms actively registered as SDVOSBs in the System for Award Management (SAM). SBA believes that the number of firms listed in SAM is the most recent and reliable data to estimate participation and total costs of the Veteran-Owned Small Business Federal Contracting Program for the purposes of this analysis because registration in SAM is required for all businesses seeking to contract with the Federal Government, registrants may select to represent themselves as SDVOSBs

without going through a certification process, and firms must recertify their registration one-year after initial SAM registration. While it is not anticipated that every firm registered as an SDVOSB in SAM will apply for certification within the first year of the Veteran-Owned Small Business Federal Contracting Program, SAM registrations serve as what SBA would consider the maximum number of firms that would likely seek certification.

Accordingly, SBA estimates that as many as 21,500 self-certified SDVOSBs could apply for initial certification within the first year of the program. This estimate is based on 32,284 SDVOSB firms registered in SAM and excludes 10,816 firms registered in SAM but already verified by VA as of December 2021.

3. What are the projected reporting, recordkeeping, and other compliance requirements of the rule?

SBA identified three types of reporting required by this final rule: initial application, program examination, and recertification at the end of the eligibility period. This final rulemaking will institute the same process of initial application, program examination, and recertification at the end of the applicant's three-year term of eligibility that currently exists for VA's VIP Verification Program. In short, the process for initial application, examination, and recertification will largely remain the same, albeit managed now by SBA. For the initial application, applicants will be required to enter information into SBA's online application platform and submit supporting documentation to prove eligibility. However, these entries will closely mirror the existing entries for VA's VIP Verification Program. Further, the information required for initial application as VOSB and SDVOSB is already held by the firms during the ordinary course of business and would require minimum preparation prior to submission. Firms likely already have the documentation required for application, examination, and recertification through the transferred program because either such documentation was

already required for certifications through VA's VIP Verification Program or such documentation is likely needed for a firm to knowingly self-certify as an SDVOSB. For the program examinations and recertifications, participants would be minimally burdened. The rule does not require recordkeeping beyond what firms do in the ordinary course of business.

For compliance, during their period of eligibility, participants would be required to review, maintain, and update documentation submitted to SBA during initial certification. In the event of a change in circumstances while in the program, participants would have previously notified SBA of the change and already uploaded documentation to support eligibility.

SBA is aware of reporting, recordkeeping and other compliance requirements and is therefore minimizing the impact on participants in the program by accepting verifications already received from VA's CVE program during the term of the firm's eligibility period, granting up to a one-year extension on recertification for verified firms, and by providing SDVOSB firms that self-certify a one-year grace period to apply for certification.

4. What are the relevant Federal rules, which may duplicate, overlap, or conflict with the rule?

VA regulations at 38 CFR Part 74 currently govern the qualification of veteran-owned and service-disabled veteran-owned small businesses for the VA's Veterans preference programs in Federal contracting. This regulation is intended to replace VA's existing regulations governing the verification of VOSBs and SDVOSBs for sole source or set-aside contracts awarded by VA.

5. What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

This final rule is intended to maintain the contracting program for SDVOSBs and VOSBs under the requirements of Section 862 of NDAA 2021. SBA is minimizing the impact on VOSBs and SDVOSBs by accepting verifications already received from VA's CVE program during the term of the firm's eligibility period, granting up to a one-year extension on recertification for verified firms, and by providing SDVOSB firms that self-certify a one-year grace period to apply for certification. The additional costs to VOSBs and SDVOSBs for certification will likely be minimal, because the required documentation (e.g., articles of incorporation, bylaws, stock ledgers or certificates, tax records) is already maintained in the normal course of business and is used to support existing certifications and self-certifications. Moreover, applicants must already provide this information to VA's CVE for verification. SBA does not anticipate that these changes will impact the content of the information currently collected.

In sum, SBA believes that this final rulemaking comprises provisions to preserve the benefits of VA's contracting programs for VOSBs and SDVOSBs while minimizing costs and satisfying the requirements of Section 862 of NDAA 2021.

For the aforementioned reasons, SBA certifies that the instant final rulemaking will not have a significant economic impact on a substantial number of small entities.

List of Subjects

13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

13 CFR Part 128

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance, Veterans.

For the reasons stated in the preamble, SBA amends 13 CFR chapter I as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for part 121 is revised to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(a)(36), 662, 694a(9), and 9012.

§ 121.103 [Amended]

2. Amend § 121.103 in paragraph (h)(1)(ii) by removing the references to “§ 125.18(b)(2) and (3)” and adding in their place a reference to “§ 128.402(c) and (d)”.

§ 121.404 [Amended]

3. Amend § 121.404 in paragraph (d) by removing the reference to “§ 125.18(b)(2) and (3)” and adding in its place a reference to “§ 128.402(c) and (d)”.

PART 125—GOVERNMENT CONTRACTING PROGRAMS

4. The authority citation for part 125 is revised to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657b, and 657r.

5. Amend § 125.1 by revising the definition of “Similarly situated entity” to read as follows:

§ 125.1 What definitions are important to SBA’s Government Contracting Programs?

* * * * *

Similarly situated entity means a subcontractor that has the same small business program status as the prime contractor. This means that: For a HUBZone contract, a subcontractor that is a certified HUBZone small business concern; for a small business set-aside, partial set-aside, or reserve, a subcontractor that is a small business concern; for a SDVOSB contract, a subcontractor that is a certified SDVOSB; for a VOSB contract, a subcontractor that is a certified VOSB; for an 8(a) contract, a subcontractor that is a

certified 8(a) BD Program Participant; for a WOSB or EDWOSB contract, a subcontractor that is a certified WOSB or EDWOSB. In addition to sharing the same small business program status as the prime contractor, a similarly situated entity must also be small for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform.

* * * * *

§ 125.6 [Amended]

6. Amend § 125.6 by:

a. Removing “an SDVO SBC contract,” in paragraph (a) introductory text and adding in its place “an SDVOSB contract, a VOSB contract,”; and

b. Removing “SDVO,” in paragraph (f)(1)(v) and adding in its place “SDVOSB, VOSB,”.

Subparts A through F [Removed]

7. Remove subparts A through F, consisting of §§ 125.12 through 125.100.

8. Add part 128 to read as follows:

PART 128 – VETERAN SMALL BUSINESS CERTIFICATION PROGRAM

Subpart A – Provisions of General Applicability

Sec.

128.100 What is the purpose of this part?

128.101 What type of assistance is available under this part?

128.102 What definitions are important in the Veteran Small Business Certification Program?

Subpart B – Eligibility Requirements for the Veteran Small Business Certification Program

128.200 What are the requirements a concern must meet to qualify as a VOSB or SDVOSB?

128.201 What other eligibility requirements apply for certification as a VOSB or SDVOSB?

128.202 Who does SBA consider to own a VOSB or SDVOSB?

128.203 Who does SBA consider to control a VOSB or SDVOSB?

128.204 What size standards apply to VOSBs and SDVOSBs?

Subpart C – Certification of VOSB or SDVOSB Status

- 128.300 How is a concern certified as a VOSB or SDVOSB?
- 128.301 Where must an application be filed?
- 128.302 How does SBA process applications for certification?
- 128.303 What must a concern submit to apply for VOSB or SDVOSB certification?
- 128.304 Can an Applicant appeal SBA's initial decision to deny an application?
- 128.305 Can an Applicant or Participant reapply for certification after a denied certification or decertification?
- 128.306 How does a concern maintain its VOSB or SDVOSB certification?
- 128.307 What are a Participant's ongoing obligations to SBA?
- 128.308 What is a program examination and what will SBA examine?
- 128.309 What are the ways a Participant may exit the Veteran Small Business Certification Program?
- 128.310 What are the procedures for decertification?

Subpart D – Federal Contract Assistance

- 128.400 What are VOSB and SDVOSB contracts?
- 128.401 What requirements must a VOSB or SDVOSB meet to submit an offer on a contract?
- 128.402 When may a joint venture submit an offer on a VOSB or SDVOSB contract?
- 128.403 What requirements are not available for VOSB or SDVOSB contracts?
- 128.404 When may a contracting officer set aside a procurement for VOSBs or SDVOSBs?
- 128.405 When may a contracting officer award a sole source contract to a VOSB or SDVOSB?
- 128.406 Are there VOSB or SDVOSB contracting opportunities at or below the simplified acquisition threshold?
- 128.407 May SBA appeal a contracting officer's decision not to make a procurement available for award as a SDVOSB contract?
- 128.408 What is the process for such an appeal?

Subpart E – Protests Concerning VOSBs and SDVOSBs

- 128.500 What are the requirements for filing a VOSB or SDVOSB status protest?

Subpart F – Penalties and Retention of Records

- 128.600 What are the requirements for representing VOSB or SDVOSB status, and what are the penalties for misrepresentation?

Subpart G – Surplus Personal Property for Veteran-Owned Small Business Programs

- 128.700 How does a VOSB obtain Federal surplus personal property?

Authority: 15 U.S.C. 632(q), 634(b)(6), 644, 645, 657f, 657f-1.

Subpart A – Provisions of General Applicability

§ 128.100 What is the purpose of this part?

Section 8127 of Title 38 within the U.S. Code (38 U.S.C. 8127) authorizes certain procurement mechanisms to provide Veteran-Owned Small Business Concerns (VOSB) and Service-Disabled Veteran-Owned Small Business Concerns (SDVOSB) with contracting assistance opportunities at the Department of Veterans Affairs (VA). Section 36 of the Small Business Act (15 U.S.C. 657f) authorizes certain procurement mechanisms to provide SDVOSBs with contracting assistance opportunities across the Federal Government. In addition, sections 36 and 36A of the Small Business Act (15 U.S.C. 657f, 657f-1) authorize the Small Business Administration (SBA) to certify the status of VOSB and SDVOSBs. This part implements these mechanisms and ensures that the program created, referred to as the Veteran Small Business Certification Program, is substantially related to this important congressional goal in accordance with applicable law.

§ 128.101 What type of assistance is available under this part?

Contracting officers are authorized to restrict competition or award sole source contracts or orders to eligible SDVOSBs. In addition, 48 CFR chapter 8 authorizes VA contracting officers to restrict competition or award sole source contracts or orders to eligible VOSBs and SDVOSBs.

§ 128.102 What definitions are important in the Veteran Small Business Certification Program?

Applicant means a firm applying for certification in the Veteran-Owned Small Business Contracting Program.

Certification database means the database of certified VOSBs and SDVOSBs eligible to participate in the Veteran Small Business Certification Program.

Contracting officer has the meaning given such term in section 2101(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 2101(1)).

Day-to-day operations means the marketing, production, sales, and administrative functions of the firm.

Employee Stock Ownership Plan (ESOP) has the meaning given such term in section 4975(e)(7) of the Internal Revenue Code of 1986 (26 U.S.C. 4975(e)(7)).

Negative control includes, but is not limited to, instances where a non-qualifying-veteran has the ability, under the concern's governing documents (*e.g.*, charter, by-laws, operating agreement, or shareholder's agreement), to prevent a quorum or otherwise block action by the board of directors or qualifying veteran owner(s).

Non-veteran means any individual who does not claim veteran status, or upon whose status an Applicant or Participant does not rely in qualifying for certification.

Participant means a small business that has been certified by SBA as eligible to participate in the Veteran Small Business Certification Program or verified by VA's Center for Verification and Evaluation prior to January 1, 2023, and appearing in the certification database.

Permanent caregiver, for purposes of this part, means the spouse, or an individual, 18 years of age or older, who is legally designated, in writing, to undertake responsibility for managing the well-being of the service-disabled veteran with a permanent and severe disability, as determined by the Department of Veterans Affairs' Veterans Benefits Administration, to include housing, health and safety. A permanent caregiver may, but does not need to, reside in the same household as the service-disabled veteran with a permanent and severe disability. In the case of a service-disabled veteran with a permanent and severe disability lacking legal capacity, the permanent caregiver shall be a parent, guardian, or person having legal custody. There may be no more than one permanent caregiver per service-disabled veteran with a permanent and severe disability.

(1) A permanent caregiver may be appointed, in a number of ways, including:

(i) By a court of competent jurisdiction;

(ii) By the Department of Veterans Affairs, National Caregiver Support Program, as the Primary Family Caregiver of a Veteran participating in the Program of Comprehensive Assistance for Family Caregivers (this designation is subject to the Veteran and the caregiver meeting other specific criteria as established by law and the Secretary and may be revoked if the eligibility criteria do not continue to be met); or

(iii) By a legal designation.

(2) Any appointment of a permanent caregiver must in all cases be accompanied by a written determination from the Department of Veterans Affairs that the veteran has a permanent and total service-connected disability as set forth in 38 CFR 3.340 for purposes of receiving disability compensation or a disability pension. The appointment must also delineate why the permanent caregiver is given the appointment, must include the consent of the veteran to the appointment and how the appointment would contribute to managing the veteran's well-being.

Qualifying veteran means a veteran upon which a VOSB's eligibility is based, or in the case of an SDVOSB, a service-disabled veteran (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) (as those terms are defined in this part) upon which a SDVOSB's eligibility is based.

Service-connected has the meaning given that term in 38 U.S.C. 101(16).

Service-disabled veteran means a veteran who possesses either a valid disability rating letter issued by the Department of Veterans Affairs, establishing a service-connected rating between 0 and 100 percent, or a valid disability determination from the Department of Defense or is registered in the Beneficiary Identification and Records Locator Subsystem or successor system, maintained by Department of Veterans Affairs' Veterans Benefits Administration as a service-disabled veteran. Reservists or members of

the National Guard disabled from a disease or injury incurred or aggravated in line of duty or while in training status also qualify.

Service-Disabled Veteran-Owned Small Business Concern (SDVOSB) means a small business concern that meets the requirements described in § 128.200(b).

Service-disabled veteran with a permanent and severe disability means a veteran with a service-connected disability that has been determined by the Department of Veterans Affairs, in writing, to have a permanent and total service-connected disability as set forth in 38 CFR 3.340 for purposes of receiving disability compensation or a disability pension.

Small business concern (SBC) means, a concern that, with its affiliates, meets the size standard corresponding to any North American Industry Classification System (NAICS) code listed in its SAM profile, pursuant to part 121 of this chapter. At the time of contract offer, a VOSB or SDVOSB must be small within the size standard corresponding to the NAICS code assigned to the contract.

Surviving spouse has the meaning given the term in 38 U.S.C. 101(3).

System for Award Management (SAM) (or any successor system) means a federal system available at www.sam.gov that consolidates various federal procurement systems (e.g., Central Contractor Registration, Federal Agency Registration, Online Representations and Certifications Application, Excluded Parties List System) and the Catalog of Federal Domestic Assistance into one system.

VA means the U.S. Department of Veterans Affairs.

Veteran has the meaning given such term in 38 U.S.C. 101(2). A Reservist or member of the National Guard called to Federal active duty or disabled from a disease or injury incurred or aggravated in line of duty or while in training status also qualifies as a veteran.

Veterans Affairs Acquisition Regulation (VAAR) is the set of rules, located at 48 CFR chapter 8, that specifically govern requirements exclusive to VA prime and subcontracting actions.

Veteran-Owned Small Business Concern (VOSB) means a small business concern that meets the requirements described in § 128.200(a).

Subpart B – Eligibility Requirements for the Veteran Small Business Certification Program

§ 128.200 What are the requirements a concern must meet to qualify as a VOSB or SDVOSB?

(a) *Qualification as a VOSB.* To qualify as a VOSB, a business entity must be:

(1) A small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its SAM profile;

(2) Not less than 51 percent owned and controlled by one or more veterans.

(b) *Qualification as an SDVOSB.* To qualify as an SDVOSB, a business entity must be:

(1) A small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its SAM profile;

(2) Not less than 51 percent owned and controlled by one or more service-disabled veterans or, in the case of a veteran with a disability that is rated by the Secretary of Veterans Affairs as a permanent and total disability who are unable to manage the daily business operations of such concern, the spouse or permanent caregiver of such veteran.

(c) *VOSB and SDVOSB certification requirement.* (1) A concern must be certified as a VOSB or SDVOSB pursuant to § 128.300 in order to be awarded a VOSB or SDVOSB set-aside or sole source contract. Any small business concern that submits a complete certification application to SBA on or before December 31, 2023, shall be

eligible to self-certify for SDVOSB sole source or set-aside contracts (other than VA contracts) until SBA declines or approves the concern's application. Any small business concern that does not submit a complete SDVOSB certification application to SBA on or before December 31, 2023, will no longer be eligible to self-certify for SDVOSB sole source or set-aside contracts effective January 1, 2024.

(2) Other small business concerns that meet the eligibility requirements of this part but do not seek SDVOSB set-aside or sole source contracts may continue to self-certify their SDVOSB status, receive prime contract or subcontract awards that are not SDVOSB set-aside or sole source contracts, and count toward an agency's goal for SDVOSB awards.

§ 128.201 What other eligibility requirements apply for certification as a VOSB or SDVOSB?

(a) *Suspension and debarment.* (1) In order to be eligible for VOSB or SDVOSB certification and to remain certified, the concern and any of its owners must not have an active exclusion in SAM.

(2) An Applicant or Participant must immediately notify SBA of any active exclusion.

(3) If, after certifying a Participant, SBA discovers that a firm has been suspended from Federal Government contracting, SBA will propose the firm for decertification pursuant to § 128.310.

(4) If, after certifying a Participant, SBA discovers that a firm has been debarred from federal government contracting, SBA will remove the Participant from the certification database immediately, notwithstanding the provisions of § 128.310.

(b) *False statements.* If, during the processing of an application, SBA determines, by a preponderance of the evidence standard, that an Applicant or its representative has knowingly submitted false information, regardless of whether correct information would

cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application. If, after certifying a Participant, SBA discovers that a firm or its representative knowingly submitted false information, SBA will initiate proceedings to decertify the Participant and remove it from the certification database pursuant to § 128.310. Whenever SBA determines that the Applicant or representative of an Applicant submitted false information, the matter will be referred to the SBA Office of Inspector General for review. In addition, SBA may request that Government-wide debarment proceedings be initiated by the agency.

(c) *Financial obligations.* An Applicant is not eligible for certification as a VOSB or SDVOSB if the concern, or any of the principals, fail to pay significant financial obligations owed to the Federal Government, including unresolved tax liens and defaults on Federal loans, or other government-assisted financing. An Applicant may become eligible for certification as a VOSB or SDVOSB if the firm or the affected principals can demonstrate that the financial obligations owed have been settled, discharged, or forgiven by the Federal Government. If, after certifying a Participant, SBA discovers that the Participant or any principals have failed to pay significant financial obligations owed to the Federal Government, SBA will initiate proceedings to decertify the Participant and remove it from the certification database pursuant to § 128.310.

§ 128.202 Who does SBA consider to own a VOSB or SDVOSB?

To qualify as a VOSB, one or more veterans must unconditionally and directly own at least 51 percent of the concern. To qualify as a SDVOSB, one or more service-disabled veterans must unconditionally and directly own at least 51 percent of the concern.

(a) *Direct ownership.* To be considered direct ownership, the qualifying veteran must own 51 percent of the concern directly, and not through another business entity or

trust (including an ESOP). However, ownership by a trust, such as a living trust, may be considered direct ownership where the trust is revocable, and qualifying veterans are the grantors, trustees, and the current beneficiaries of the trust.

(b) *Unconditional ownership.* To be considered unconditional, ownership must not be subject to any conditions, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity).

(1) The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

(2) In determining unconditional ownership, SBA will disregard any unexercised stock options or similar agreements held by qualifying veterans. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by non-veterans will be treated as exercised, except for any ownership interests which are held by investment companies licensed under 15 U.S.C. 681 *et. seq.*

(3) A right of first refusal granting the non-qualifying-veteran the contractual right to purchase the ownership interests of the qualifying veteran, does not affect the unconditional nature of ownership, if the terms follow normal commercial practices. If those rights are exercised by the non-qualifying-veteran, a Participant must notify SBA in accordance with § 128.307. If the exercise of those rights results in the qualifying veteran(s) owning less than 51% of the concern, SBA will initiate decertification pursuant to § 128.310.

(c) *Ownership of a partnership.* In the case of a concern that is a partnership, at least 51% of aggregate voting interest must be unconditionally owned by one or more

qualifying veterans. The ownership must be reflected in the concern's partnership agreement.

(d) *Ownership of a limited liability company.* In the case of a concern which is a limited liability company, at least 51% of each class of member interest must be unconditionally owned by one or more qualifying veterans.

(e) *Ownership of a corporation.* In the case of a concern which is a corporation, at least 51% of the aggregate of all stock outstanding and at least 51% of each class of voting stock outstanding must be unconditionally owned by one or more qualifying veterans. In the case of a publicly-owned business, not less than 51 percent of the stock (not including any stock owned by an ESOP) must be unconditionally owned by one or more qualifying veterans.

(f) *Change of ownership.* A Participant may change its ownership or business structure so long as one or more qualifying veterans own and control it after the change. A Participant must notify SBA of a change of ownership in accordance with § 128.307 and attest to its continued eligibility.

(g) *Dividends and distributions.* One or more qualifying veterans must be entitled to receive:

(1) At least 51 percent of the annual distribution of profits paid to the owners of a corporation, partnership, or limited liability company concern, and a qualifying veteran's ability to share in the profits of the concern must be commensurate with the extent of his/her ownership interest in that concern.

(2) 100 percent of the value of each share of stock owned by them in the event that the stock or member interest is sold;

(3) At least 51 percent of the retained earnings of the concern and 100 percent of the unencumbered value of each share of stock or member interest owned in the event of dissolution of the corporation, partnership, or limited liability company; and

(h) *Community property*. Ownership will be determined without regard to community property laws.

(i) *Surviving spouse*. (1) A small business concern owned and controlled by one or more service-disabled veterans immediately prior to the death of a service-disabled veteran who was the owner of the concern, the death of whom causes the concern to be less than 51 percent owned by one or more service-disabled veterans, will continue to qualify as a small business concern owned and controlled by service-disabled veterans during the time period specified in paragraph (i)(2) of this section if:

(i) The surviving spouse of the deceased veteran acquires such veteran's ownership interest in such concern;

(ii) Such veteran had a service-connected disability (as defined in 38 U.S.C. 101(16)); and

(iii) For a Participant, immediately prior to the death of such veteran, and during the period described in paragraph (i)(2) of this section, the small business concern is included in the certification database.

(2) The time period described in paragraph (i)(1)(iii) of this section is the time period beginning on the date of the veteran's death and ending on the earlier of --

(i) The date on which the surviving spouse remarries;

(ii) The date on which the surviving spouse relinquishes an ownership interest in the small business concern;

(iii) In the case of a surviving spouse of a veteran with a service-connected disability rated as 100 percent disabling or who dies as a result of a service-connected disability, 10 years after the date of the death of the veteran; or

(iv) In the case of a surviving spouse of a veteran with a service-connected disability rated as less than 100 percent disabling who does not die as a result of a service-connected disability, 3 years after the date of the death of the veteran.

§ 128.203 Who does SBA consider to control a VOSB or SDVOSB?

(a) *General.* To be an eligible VOSB, the management and daily business operations of the concern must be controlled by one or more veterans. To be an eligible SDVOSB, the management and daily business operations of the concern must be controlled by one or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran). Control by one or more qualifying veterans means that one or more qualifying veterans controls both the long-term decision-making and the day-to-day operations of the Applicant or Participant.

(b) *Managerial position and experience.* A qualifying veteran must hold the highest officer position in the concern (usually President or Chief Executive Officer) and must have managerial experience of the extent and complexity needed to control the concern. The qualifying veteran need not have the technical expertise or possess the required license to be found to control of the concern if the qualifying veteran can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.

(c) *Control over a partnership.* In the case of a partnership, one or more qualifying veterans must serve as general partners, with control over all partnership decisions.

(d) *Control over a limited liability company.* In the case of a limited liability company, one or more qualifying veterans must serve as managing members, with control over all decisions of the limited liability company.

(e) *Control over a corporation.* One or more qualifying veterans must control the Board of Directors of the concern.

(1) SBA will deem qualifying veterans to control the Board of Directors where:

(i) One qualifying veteran owns 100% of all voting stock and is on the Board of Directors;

(ii) One qualifying veteran owns at least 51% of all voting stock, the qualifying veteran is on the Board of Directors, and no supermajority voting requirements exist for shareholders to approve corporation actions. Where supermajority voting requirements are provided for in the concern's articles of incorporation, its by-laws, or by state law, the qualifying veteran must own at least the percent of the voting stock needed to overcome any such supermajority voting requirements; or

(iii) Two or more qualifying veterans together own at least 51% of all voting stock, each such qualifying veteran is on the Board of Directors, no supermajority voting requirements exist, and the qualifying veteran shareholders can demonstrate that they have made enforceable arrangements to permit one qualifying veteran to vote the stock of all qualifying veterans as a block without a shareholder meeting. Where the concern has supermajority voting requirements, the qualifying veteran shareholders must own at least that percentage of voting stock needed to overcome any such supermajority ownership requirements.

(2) Where a concern does not meet the requirements set forth in paragraph (e)(1) of this section, the qualifying veteran(s) must control the Board of Directors through actual numbers of voting directors or, where permitted by state law, through weighted voting (*e.g.*, in a concern having a two-person Board of Directors where one individual on the Board is a qualifying veteran and one is not, the qualifying veteran vote must be weighted - worth more than one vote - in order for the concern to be eligible). Where a concern seeks to comply with this paragraph (e)(2):

(i) Provisions for the establishment of a quorum cannot permit non-qualifying-veteran Directors to control the Board of Directors, directly or indirectly; and

(ii) Any Executive Committee of Directors must be controlled by qualifying veteran Directors unless the Executive Committee can only make recommendations to and cannot independently exercise the authority of the Board of Directors.

(iii) Non-qualifying-veterans may be found to control or have the power to control in circumstances where non-qualifying-veterans control the Board of Directors of the Applicant or Participant, either directly through majority voting membership, or indirectly, where the by-laws allow non-qualifying-veterans to prevent a quorum or block actions proposed by the qualifying veterans.

(3) Non-voting, advisory, or honorary Directors may be appointed without affecting qualifying veterans' control of the Board of Directors.

(4) Arrangements regarding the structure and voting rights of the Board of Directors must comply with applicable state law.

(f) *Supermajority requirements.* One or more qualifying veteran(s) must meet all supermajority voting requirements regarding the management and daily business operations of the concern, regardless of the legal structure of the firm. An Applicant must inform the SBA, when applicable, of any supermajority voting requirements provided for in its articles of incorporation, its by-laws, by state law, or otherwise. Similarly, after being certified, a Participant must inform the SBA of changes regarding supermajority voting requirements.

(g) *Unexercised rights.* A qualifying veteran's unexercised right to cause a change in the control or management of the concern does not in itself constitute control, regardless of how quickly or easily the right could be exercised.

(h) *Limitations on control by non-qualifying-veterans.* (1) A non-qualifying-veteran must not:

(i) Exercise actual control or have the power to control the concern;

(ii) Have business relationships that cause such dependence that the qualifying veteran cannot exercise independent business judgment without great economic risk;

(iii) Control the Applicant or Participant through loan arrangements (which does not include providing a loan guaranty on commercially reasonable terms);

(iv) Provide critical financial or bonding support or a critical license to the Applicant or Participant, which directly or indirectly allows the non-qualifying-veteran significantly to influence business decisions of the qualifying veteran.

(2) A non-qualifying-veteran may be involved in the management of the concern, and may be a stockholder, partner, limited liability member, officer, and/or director of the concern. However, a non-qualifying-veteran generally may not:

(i) Be a former employer, or a principal of a former employer, of any qualifying veteran, unless the concern demonstrates that the relationship between the former employer or principal and the qualifying veteran does not give the former employer actual control or the potential to control the Applicant or Participant and such relationship is in the best interests of the concern; or

(ii) Receive compensation from the concern in any form as a director, officer, or employee, that exceeds the compensation to be received by the qualifying veteran who holds the highest officer position (usually Chief Executive Officer or President), unless the concern demonstrates that the compensation to be received by the non-qualifying veteran is commercially reasonable or that the qualifying veteran has elected to take lower compensation to benefit the concern.

(i) *Limitation on outside obligations.* The qualifying veteran who holds the highest officer position of the business concern may not engage in outside obligations that prevent the qualifying veteran from devoting the time and attention to the concern necessary to control its management and daily business operations. A qualifying veteran generally must devote full-time during the business's normal hours of operations, unless

the concern demonstrates that the qualifying veteran has ultimate managerial and supervisory control over both the long-term decision making and day-to-day management of the concern. Where a qualifying veteran claiming to control a business concern devotes fewer hours to the business than its normal hours of operation, SBA will assume that the qualifying veteran does not control the concern, unless the concern demonstrates that the qualifying veteran has ultimate managerial and supervisory control over both the long-term decision making and day-to-day management of the business.

(j) *Exception for extraordinary circumstances.* SBA will not find that a lack of control exists where a qualifying veteran does not have the unilateral power and authority to make decisions regarding the following extraordinary circumstances:

- (1) Adding a new equity stakeholder;
- (2) Dissolution of the company;
- (3) Sale of the company or all assets of the company;
- (4) The merger of the company; and
- (5) Company declaring bankruptcy.

(k) *Exception for active duty.* Notwithstanding the requirements of this section, where a qualifying veteran is a reserve component member in the United States military who has been called to active duty, the concern may elect to designate in writing one or more individuals to control the concern on behalf of the qualifying veteran during the period of active duty. The concern must keep records evidencing the qualifying veteran's active duty status and the written designation of control and provide those documents to SBA.

§ 128.204 What size standards apply to VOSBs and SDVOSBs?

(a) *Time of certification.* At the time of certification, a VOSB or SDVOSB must be a small business under the size standard corresponding to any NAICS code listed in its SAM profile. If SBA is unable to verify that an Applicant is small, SBA may deny the

concern's application as a certified VOSB or SDVOSB, or SBA may request a formal size determination pursuant to part 121 of this chapter.

(b) *Time of contract offer.* In connection with a VOSB or SDVOSB contract, a VOSB or SDVOSB must be small under the size standard corresponding to the NAICS code assigned to the contract at the time it submits its initial offer or response which includes price. To be eligible for a VOSB or SDVOSB multiple award contract, a VOSB or SDVOSB must be small pursuant to the requirements of § 121.404(a)(1) of this chapter. If the contracting officer is unable to verify that the VOSB or SDVOSB is small, the contracting officer should submit a size protest to SBA in accordance with part 121 of this chapter.

Subpart C - Certification of VOSB or SDVOSB Status

§ 128.300 How is a concern certified as a VOSB or SDVOSB?

A concern must apply to SBA for certification as a VOSB or SDVOSB. The concern must submit evidence that it is a small business owned and controlled by one or more qualifying veterans. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. If SBA determines that a concern meets the eligibility requirements of a VOSB or SDVOSB, it will notify the concern and designate the concern as a certified VOSB or SDVOSB in the certification database.

§ 128.301 Where must an application be filed?

An application for certification as a VOSB or SDVOSB must be electronically filed according to the instructions on SBA's website at www.sba.gov. Upon receipt of the Applicant's electronic submission, an acknowledgment message will be dispatched to the concern containing estimated processing time and other information.

§ 128.302 How does SBA process applications for certification?

(a) SBA's Director of Government Contracting (D/GC) (or designee) is authorized to approve or deny applications for certification as a VOSB or SDVOSB.

(b) SBA, in its sole discretion, may request clarification of information relating to eligibility at any time in the eligibility determination process. SBA will take into account any clarifications made by an Applicant in response to such a request.

(c) SBA, in its sole discretion, may request additional documentation at any time in the eligibility determination process. Failure to adequately respond to the documentation request shall constitute grounds for a denial.

(d) An Applicant's eligibility will be based on the totality of circumstances, including facts set forth in the application, supporting documentation, any information received in response to any SBA request for clarification, any independent research conducted by SBA, and any changed circumstances. The Applicant bears the burden of proof to demonstrate its eligibility as a VOSB or SDVOSB.

(e) The Applicant must inform SBA of any changed circumstances that occur during its application review and that could affect its eligibility for the program (e.g., change in size status, ownership, or control, filing of bankruptcy, or calling to active duty) and may withdraw its application at that time. Changed circumstances will be considered by SBA in determining an Applicant's eligibility and may constitute grounds for denial of the application. The D/GC may propose decertification for any VOSB or SDVOSB that failed to inform SBA of any changed circumstances that affected its eligibility for the program during the processing of the application.

(f) The decision of the D/GC to approve or deny an application will be in writing. A decision to deny certification status will state the specific reason(s) for denial and will inform the Applicant of any appeal rights.

(g) If the D/GC approves the application, the period of program eligibility will be specified in the concern's certification letter.

(h) SBA will send a copy of the decision letter to the electronic mail address provided with the application. SBA will consider any decision sent to this electronic mail

address provided to have been received by the applicant concern. It is the responsibility of the Applicant to ensure all contact information is current in the certification database.

§ 128.303 What must a concern submit to apply for VOSB or SDVOSB certification?

(a) To be certified by SBA as a VOSB or SDVOSB, a concern must provide documents and information demonstrating that it is owned and controlled by one or more qualifying veterans and qualifies as a small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its SAM profile. A list of the minimum required documents that must be submitted can be found on SBA's website at www.sba.gov on or before January 1, 2023.

(b) Where an Applicant small business concern is a participant in the 8(a) Business Development (BD) Program and the individual upon whom 8(a) BD Program eligibility is based is a qualifying veteran, the Applicant may use documentation of its most recent annual review, or documentation of its 8(a) BD Program acceptance if it has not yet had an annual review, in support of its application for certification as a VOSB or SDVOSB. An Applicant must certify that there have been no material changes in its ownership or control since its 8(a) BD Program certification or annual review and demonstrate that the individual(s) who own and control it are qualifying veterans.

(c) A small business concern that is certified by the WOSB/EDWOSB Program and the individual(s) upon whom WOSB/EDWOSB Program eligibility is based is one or more qualifying veterans may use documentation of its most recent annual recertification, or documentation of its acceptance in support of its application for certification. An Applicant must certify that there are no material changes in its ownership or control since its WOSB certification or recertification and demonstrate that the individuals who own and control it are qualifying veterans.

(d) If a concern was decertified or previously denied certification from the Veteran Small Business Certification Program within the past 3 years, it must include with its application for certification a full explanation of why it was decertified or denied certification, and what, if any, changes have been made. If SBA is not satisfied with the explanation provided, SBA will deny the concern.

(e) If the concern was decertified for failure to notify SBA of a material change affecting its eligibility pursuant to § 128.307, it must include with its application for certification a full explanation of why it failed to notify SBA of the material change. If SBA is not satisfied with the explanation provided, SBA will deny the concern.

(f) Participants must retain documentation demonstrating satisfaction of all qualifying requirements during the entire period of participation.

§ 128.304 Can an Applicant appeal SBA's initial decision to deny an application?

An Applicant may appeal SBA's decision to deny an application for certification as a VOSB or SDVOSB by filing an appeal with the SBA's Office of Hearings and Appeals (OHA) in accordance with part 134 of this chapter. A denial or decertification based on the failure to provide sufficient evidence of the qualifying individual's status as a veteran or a service-disabled veteran is not subject to appeal to OHA.

§ 128.305 Can an Applicant or Participant reapply for certification after a denied certification or decertification?

An Applicant that SBA denied certification or a Participant that SBA has decertified may submit an application for certification no sooner than ninety (90) calendar days from the date of final agency decision (*i.e.*, the SBA decision if no appeal is filed or the decision of SBA's OHA where an appeal is filed pursuant to § 128.304) if it believes that it has overcome all of the reasons for denial or decertification and is currently eligible.

§ 128.306 How does a concern maintain its VOSB or SDVOSB certification?

(a) Any Participant seeking to remain certified must recertify its eligibility every 3 years. There is no limitation on the number of times a business may recertify. Participants may recertify within 120 calendar days prior to the termination of their eligibility period. If the concern fails to recertify, SBA may decertify the firm at the end of their eligibility period.

(b) The Participant must maintain its eligibility during its participation in the program and must inform SBA of any changes that may affect its eligibility within 30 calendar days in accordance with § 128.307.

(c) The Participant must respond to any program examination initiated by SBA to remain a certified VOSB or SDVOSB.

(d) At the discretion of the Administrator (or designee), a Participant's eligibility period may be extended by a period of up to one year.

§ 128.307 What are a Participant's ongoing obligations to SBA?

Once certified, a VOSB or SDVOSB must notify SBA of any material changes that could affect its eligibility, within 30 calendar days of any such change, and attest to its continued eligibility. Material changes include, but are not limited to, a change in the firm's ownership, business structure, or control, filing of bankruptcy, or change in active duty status. The method for notifying SBA can be found on SBA's web page. A concern's failure to notify SBA of a material change may result in decertification, pursuant to § 128.310. In addition, SBA may seek the imposition of penalties under § 128.600.

§ 128.308 What is a program examination and what will SBA examine?

(a) *General.* A program examination is an investigation by SBA officials, which verifies the accuracy of any statement or information provided by a certified Participant. SBA may verify that the Participant currently meets the eligibility requirements of this part and that it met such requirements at the time of its application. An examination may be conducted on a random, unannounced basis, or upon receipt of specific and credible

information alleging that a Participant did not meet the eligibility requirements in this part when it was certified or no longer meets all of those requirements.

(b) *Scope of examination.* SBA may review any information related to the concern's eligibility including, but not limited to, documentation related to the firm's legal structure, ownership, and control. Examiners may review any information previously provided to SBA and any additional information requested by SBA at the time of program examination. SBA may draw an adverse inference from a concern's failure to cooperate with a program examination or provide requested information and assume that the information that the concern failed to provide would demonstrate ineligibility, and decertify on this basis pursuant to § 128.310.

(c) *Outcome of examination.* Upon its completion of the examination, SBA will issue a written decision.

(1) If SBA finds that the Participant does not qualify as a VOSB or SDVOSB, the procedures at § 128.310 will apply, except as provided in § 128.201.

(2) If SBA finds that the Participant continues to qualify as a VOSB or SDVOSB, the original eligibility period remains in effect.

§ 128.309 What are the ways a Participant may exit the Veteran Small Business Certification Program?

(a) *Voluntary withdrawal.* A Participant may voluntarily withdraw from the Veteran Small Business Certification Program at any time. Once a concern notifies SBA that it seeks to voluntarily withdraw from the program, SBA will decertify the concern and remove its designation as a certified VOSB or SDVOSB in the certification database. The concern may reapply for SDVOSB or VOSB certification ninety (90) calendar days after the date of decertification. At reapplication, the concern must demonstrate that it meets all eligibility requirements.

(b) *Decertification by SBA.* SBA may decertify a Participant and remove its designation as a VOSB or SDVOSB in the certification database in accordance with § 128.310. The concern may reapply for certification ninety (90) calendar days after the date of decertification. At reapplication, the concern must demonstrate that it meets all eligibility requirements.

(c) *Decertification pursuant to a protest.* Any certified VOSB or SDVOSB that is found to be ineligible through a VOSB or SDVOSB status protest decision will be immediately removed from the certification database. The concern may reapply for certification ninety (90) calendar days after the date of decertification. At reapplication, the concern must demonstrate that it meets all eligibility requirements.

(d) *Decertification due to suspension or debarment.* SBA may decertify a Participant immediately upon notice that the Participant or any of its owners has an active exclusion in SAM, pursuant to § 128.201.

§ 128.310 What are the procedures for decertification?

(a) *Proposed decertification.* If SBA has information indicating that a Participant may not meet the eligibility requirements of this part, SBA may propose decertification of the concern. The notice of proposed decertification will notify the concern that it has 30 calendar days from the date it receives the letter to submit a written response to SBA explaining why the proposed ground(s) should not justify decertification. SBA will consider that written notice was provided if SBA sends the notice of proposed decertification to the concern at an email address in the Participant's certification database profile.

(b) *Response to proposed decertification.* The Participant must submit a written response to the notice of proposed decertification within the timeframe specified in the notice. In this response, the Participant must rebut each of the reasons set forth by SBA in the notice of proposed decertification, and where appropriate, the rebuttal must include

documents showing that the concern is eligible as of the date specified in the notice. If a Participant fails to cooperate with SBA or fails to provide the information requested, SBA may draw an adverse inference and assume that the information that the concern failed to provide would demonstrate ineligibility.

(c) *Decision.* SBA will review the response and determine whether the Participant remains eligible. If SBA determines that the Participant is not eligible, the D/GC will issue a notice of decertification. The notice will set forth the specific facts and reasons for the decision, notify the concern of the right to appeal, and will advise the concern that it may re-apply after it has met all eligibility criteria in this part and completed the waiting period as set forth in § 128.305(a). If SBA finds that the concern is eligible, the Participant will continue to be designated as a VOSB or SDVOSB in the certification database.

(d) *Effect of decertification.* On the effective date of a concern's decertification, SBA will remove its designation as a certified VOSB or SDVOSB in the certification database. However, such concern is obligated to perform previously awarded contracts to the completion of their existing term of performance.

(e) *Appeals.* A concern that has been decertified pursuant to this section may file an appeal with OHA in accordance with part 134 of this chapter. The decision on the appeal shall be final. If no appeal is filed, the D/GC's decision is the final agency decision.

Subpart D - Federal Contract Assistance

§ 128.400 What are VOSB and SDVOSB contracts?

(a) VOSB contracts are exclusively VA procurements, including prime contracts and subcontracts for which the VA is the procuring agency. For VA procurements, the VAAR (48 CFR chapter 8) specifically governs requirements exclusive to VA prime and

subcontracting actions. The VAAR supplements the Federal Acquisition Regulation (FAR), which contains guidance applicable to most Federal agencies.

(b) SDVOSB contracts, including Multiple Award Contracts (see § 125.1 of this chapter), are contracts available to an SDVOSB through any of the following procurement methods:

(1) Sole source awards to an SDVOSB;

(2) Set-aside awards, including partial set-asides, based on competition restricted to SDVOSBs;

(3) Awards based on a reserve for SDVOSBs in a solicitation for a Multiple Award Contract (*see* § 125.1 of this chapter); or

(4) Orders set aside for SDVOSBs against a Multiple Award Contract, which had been awarded in full and open competition or as a small business set-aside.

§ 128.401 What requirements must a VOSB or SDVOSB meet to submit an offer on a contract?

(a) *Certification requirement.* In order for a concern to submit an offer and be eligible for the award of a VOSB or SDVOSB set-aside or sole source contract, the concern must qualify as a small business concern under the size standard corresponding to the NAICS code assigned to the contract and be a certified VOSB or SDVOSB. Any small business concern that submits a complete certification application with to SBA on or before December 31, 2023, shall be eligible to self-certify for SDVOSB sole source or set-aside contracts (other than VA contracts) until SBA declines or approves the concern's application. Any small business concern that does not submit to SBA a complete SDVOSB certification application to SBA on or before December 31, 2023, will no longer be eligible to self-certify for SDVOSB sole source or set-aside contracts effective January 1, 2024.

(b) *Joint ventures.* A joint venture may submit an offer for a VOSB or SDVOSB contract if the joint venture meets the requirements set forth in § 128.402.

(c) *Non-manufacturers.* A certified VOSB or SDVOSB that is a non-manufacturer may submit an offer on a VOSB or SDVOSB contract for supplies if it meets the requirements of the non-manufacturer rule set forth at § 121.406(b)(1) of this chapter.

(d) *Multiple Award Contracts—(1) VOSB or SDVOSB status.* With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(i) SBA determines a VOSB or SDVOSB's eligibility for the underlying Multiple Award Contract as of the date a business concern certifies its status as a certified VOSB or SDVOSB as part of its initial offer or response which includes price, unless the firm was required to recertify under paragraph (e) of this section.

(A) *Unrestricted Multiple Award Contracts or set-aside Multiple Award Contracts for other than VOSB or SDVOSB.* For an unrestricted Multiple Award Contract or other Multiple Award Contract not specifically set aside for VOSBs or SDVOSBs, if a business concern is a certified VOSB or SDVOSB at the time of offer and contract-level recertification for the Multiple Award Contract, it is a VOSB or SDVOSB for goaling purposes for each order issued against the contract, unless a contracting officer requests recertification as a VOSB or SDVOSB for a specific order or Blanket Purchase Agreement or a contracting officer sets aside an order exclusively for VOSBs or SDVOSBs. Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set aside exclusively for VOSBs or SDVOSBs, a concern must be a certified VOSB or SDVOSB at the time it submits its initial offer or response which includes price, for the particular order or Blanket Purchase Agreement. However, where the underlying Multiple Award Contract has been awarded to a pool of

concerns for which certified VOSB or SDVOSB status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set aside exclusively for concerns in the certified VOSB or SDVOSB pool, concerns need not recertify their status as VOSBs or SDVOSBs (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(B) *VOSB or SDVOSB set-aside Multiple Award Contracts.* For a Multiple Award Contract that is specifically set aside for VOSBs or SDVOSBs, if a business concern is a certified VOSB or SDVOSB at the time of offer and contract-level recertification for the Multiple Award Contract, it is a VOSB or SDVOSB for each order issued against the contract, unless a contracting officer requests recertification as a VOSB or SDVOSB for a specific order or Blanket Purchase Agreement.

(ii) SBA will determine VOSB or SDVOSB status at the time of initial offer or response which includes price, for an order or an Agreement issued against a Multiple Award Contract, if the contracting officer requests a new VOSB or SDVOSB certification for the order or Agreement.

(iii) For an indefinite delivery, indefinite quantity (IDIQ), Multiple Award Contract, where concerns are not required to submit price as part of the offer for the IDIQ contract, size will be determined as of the date of initial offer, which may not include price.

(2) *Total set-aside contracts.* The certified VOSB or SDVOSB must comply with the applicable limitations on subcontracting provisions (*see* § 125.6 of this chapter) and the nonmanufacturer rule (*see* § 121.406(b) of this chapter), if applicable, in the performance of a contract totally set aside for VOSBs or SDVOSBs. However, contracting officers, in their discretion, may require a concern to perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.

(3) *Partial set-aside contracts.* For orders awarded under a partial set-aside contract, the certified VOSB or SDVOSB must comply with the applicable limitations on subcontracting provisions (*see* § 125.6 of this chapter) and the nonmanufacturer rule (*see* § 121.406(b) of this chapter), if applicable, during each performance period of the contract (e.g., during the base term and then during each option period thereafter). For orders awarded under the non-set-aside portion, the VOSB or SDVOSB need not comply with any limitations on subcontracting or nonmanufacturer rule requirements. However, contracting officers, in their discretion, may require a concern to perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.

(4) *Orders.* The certified VOSB or SDVOSB must comply with the applicable limitations on subcontracting provisions (*see* § 125.6 of this chapter) and the nonmanufacturer rule (*see* § 121.406(b) of this chapter), if applicable, in the performance of each individual order that has been set aside for VOSBs or SDVOSBs.

(5) *Reserves.* The certified VOSB or SDVOSB must comply with the applicable limitations on subcontracting provisions (*see* § 125.6 of this chapter) and the nonmanufacturer rule (*see* § 121.406(b) of this chapter), if applicable, in the performance of an order that is set aside for VOSBs or SDVOSBs. However, the VOSB or SDVOSB will not have to comply with the limitations on subcontracting provisions and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed among VOSBs or SDVOSBs, and other-than-small business concerns.

(e) *Recertification.* (1) A Participant that qualifies as a VOSB or SDVOSB at the time of initial offer response which includes price, including a Multiple Award Contract, is generally considered to be a VOSB or SDVOSB throughout the life of that contract. This means that if a VOSB or SDVOSB is certified at the time of initial offer for a Multiple Award Contract, then it will be considered a VOSB or SDVOSB for each order

issued against the contract, unless a contracting officer requests a new VOSB or SDVOSB eligibility review in connection with a specific order. Where a concern is later decertified from the Veteran-Owned Small Business Contracting Program, the procuring agency may exercise options and still count the award as an award to a VOSB or SDVOSB. For a Multiple Award Contract, a concern that has been decertified from the Veteran-Owned Small Business Contracting Program may still be issued orders as a VOSB or SDVOSB unless the contracting officer requests recertification of VOSB or SDVOSB status in connection with the order. However, the following exceptions apply to this paragraph (e)(1):

(i) Where a contract is novated to another business concern, the concern that will continue performance on the contract must recertify its status as a VOSB or SDVOSB to the procuring agency or inform the procuring agency that it does not qualify as a VOSB or SDVOSB within 30 calendar days of the novation approval. If the concern is not a VOSB or SDVOSB, the agency can no longer count the options or orders issued pursuant to the contract from that point forward towards its VOSB or SDVOSB goals.

(ii) Where a concern that is performing a contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its VOSB or SDVOSB status to the procuring agency or inform the procuring agency that it no longer qualifies as a VOSB or SDVOSB. If the contractor is not a VOSB or SDVOSB, the agency can no longer count the options or orders issued pursuant to the contract from that point forward towards its VOSB or SDVOSB goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new status.

(iii) Where there has been a VOSB or SDVOSB status protest on the solicitation or contract, part 134 of this chapter describes the effect of the status determination on the contract award.

(2) For the purposes of VOSB or SDVOSB contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its VOSB or SDVOSB status no more than 120 calendar days prior to the end of the fifth year of the contract, and no more than 120 calendar days prior to exercising any option. If the business is unable to recertify its status as a certified VOSB or SDVOSB, the procuring agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its VOSB or SDVOSB goals.

(i) A business concern that did not certify itself as a VOSB or SDVOSB, either initially or prior to an option being exercised, may recertify itself as a VOSB or SDVOSB for a subsequent option period if it meets the eligibility requirements in this part at that time.

(ii) Recertification does not change the terms and conditions of the contract. The limitations on subcontracting (*see* § 125.6 of this chapter), nonmanufacturer (*see* § 121.406(b) of this chapter), and subcontracting plan requirements (*see* § 125.3(a) of this chapter) in effect at the time of contract award remain in effect throughout the life of the contract. However, a concern that initially self-certified as an SDVOSB for the award of an SDVOSB contract may recertify as an SDVOSB only if it is currently a certified SDVOSB.

(iii) Where the contracting officer explicitly requires concerns to recertify their status in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its response to the solicitation for the order.

(iv) A concern's status may be determined at the time of a response to a solicitation for an Agreement and each order issued pursuant to the Agreement.

(f) *Limitations on subcontracting.* A business concern seeking a VOSB or SDVOSB contract must meet the applicable limitations on subcontracting requirements set forth in § 125.6 of this chapter.

(g) *Ostensible subcontractor.* Where a subcontractor that is not a certified VOSB or SDVOSB will perform the primary and vital requirements of a VOSB or SDVOSB contract, or where a VOSB or SDVOSB prime contractor is unduly reliant on one or more small businesses that are not certified VOSBs or SDVOSBs to perform the VOSB or SDVOSB contract, the prime contractor is not eligible for award of that VOSB or SDVOSB contract.

(1) When the subcontractor qualifies as small for the size standard assigned to the procurement, this issue may be grounds for a VOSB or SDVOSB status protest, as described in § 134.1003(c) of this chapter. When the subcontractor is alleged to be other than small for the size standard assigned to the procurement, this issue may be grounds for a size protest under the ostensible subcontractor rule, as described at § 121.103(h)(2) of this chapter.

(2) SBA will find that a prime VOSB or SDVOSB contractor is performing the primary and vital requirements of a contract or order, and is not unduly reliant on one or more subcontractors that are not certified VOSBs or SDVOSBs, where the prime contractor can demonstrate that it, together with any subcontractors that are certified VOSBs or SDVOSBs, will meet the limitations on subcontracting provisions set forth in § 125.6 of this chapter.

(h) *Two-step procurements.* For purposes of architect-engineering, design-build or two-step sealed bidding procurements, a concern must be certified as a VOSB or SDVOSB as of the date that it submits its initial bid or proposal (which may or may not include price) during phase one.

§ 128.402 When may a joint venture submit an offer on a VOSB or SDVOSB contract?

(a) *General.* A certified VOSB or SDVOSB may enter into a joint venture agreement with one or more other small business concerns, or with an approved mentor authorized by § 125.9 of this chapter, for the purpose of submitting an offer for a VOSB or SDVOSB contract. The joint venture itself need not be a certified VOSB or SDVOSB. Where this section references the requirements of a VOSB or SDVOSB joint venture partner, the VOSB or SDVOSB status of that joint venture partner must correspond with the type of award (e.g., to be eligible for a SDVOSB contract, a SDVOSB joint venture partner must be the managing venturer of the joint venture).

(1) The VOSB or SDVOSB joint venture partner must be certified in accordance with this part;

(2) The joint venture agreement must comply with the requirements set forth in this part; and

(3) A VOSB or SDVOSB cannot be a joint venture partner on more than one joint venture that submits an offer for a specific contract set-aside or reserved for VOSBs or SDVOSBs.

(b) *Size.* (1) A joint venture of at least one certified VOSB or SDVOSB and one or more other business concerns may submit an offer as a small business for a competitive VOSB or SDVOSB procurement or sale, or be awarded a sole source VOSB or SDVOSB contract, so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement or sale.

(2) A joint venture between a protégé firm certified as a VOSB or SDVOSB and its SBA-approved mentor (*see* § 125.9 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the VOSB or SDVOSB procurement or sale.

(c) *Contents of joint venture agreement.* Every joint venture agreement to perform a VOSB or SDVOSB contract, including those between a protégé firm certified as a VOSB or SDVOSB and its SBA-approved mentor authorized by § 125.9 of this chapter, must contain a provision:

(1) Setting forth the purpose of the joint venture;

(2) Designating a certified VOSB or SDVOSB as the managing venturer of the joint venture and designating a named employee of the certified VOSB or SDVOSB managing venturer as the manager with ultimate responsibility for performance of the contract (the “Responsible Manager”);

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary;

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the certified VOSB or SDVOSB at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the certified VOSB or SDVOSB if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the certified VOSB or SDVOSB for purposes of performance under the joint venture; and

(iii) Although the joint venture managers responsible for orders issued under an indefinite delivery/indefinite quantity contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager;

(3) Stating that with respect to a separate legal entity joint venture, the certified VOSB or SDVOSB must own at least 51% of the joint venture entity;

(4) Stating that the certified VOSB or SDVOSB must receive profits from the joint venture commensurate with the work performed by the certified VOSB or SDVOSB, or a percentage agreed to by the parties to the joint venture whereby the certified VOSB or SDVOSB receives profits from the joint venture that exceed the percentage commensurate with the work performed by the certified VOSB or SDVOSB;

(5) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. All payments due the joint venture for performance on a VOSB or SDVOSB contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the certified VOSB or SDVOSB partner(s) to the joint venture will meet the limitations on subcontracting requirements set forth in paragraph (b)(3) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the

level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the certified VOSB or SDVOSB partner(s) to the joint venture will meet the limitations on subcontracting requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

(8) Obligating all parties to the joint venture to ensure performance of the VOSB or SDVOSB contract and to complete performance despite the withdrawal of any member;

(9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the certified VOSB or SDVOSB managing venturer, unless approval to keep them elsewhere is granted by the District Director (or designee) upon written request;

(10) Requiring that the final original records be retained by the certified VOSB or SDVOSB managing venturer upon completion of the VOSB or SDVOSB contract performed by the joint venture;

(11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 calendar days after completion of the contract.

(d) *Limitations on subcontracting.* (1) For any VOSB or SDVOSB contract, including those between a protégé and a mentor authorized by § 125.9 of this chapter, the joint venture must perform the applicable percentage of work required by § 125.6 of this chapter.

(2) The certified VOSB or SDVOSB partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture, except that in the context of a joint venture between a protégé VOSB or SDVOSB and its SBA-approved mentor the VOSB or SDVOSB protégé must individually perform at least 40% of the work performed by the joint venture.

(i) The work performed by the certified VOSB or SDVOSB partner(s) to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience.

(ii) The amount of work done by the partners will be aggregated and the work done by the certified VOSB or SDVOSB partners must be at least 40% of the total done by all partners. In determining the amount of work done by a non-VOSB or SDVOSB partner, all work done by the non-VOSB or SDVOSB partner and any of its affiliates at any subcontracting tier will be counted.

(e) *Certification of compliance—*(1) *At time of offer.* If submitting an offer as a joint venture for a VOSB or SDVOSB contract, at the time of initial offer (and if applicable, final offer), each certified VOSB or SDVOSB joint venture partner must make the following certifications to the contracting officer separately under its own name:

(i) It is a certified VOSB or SDVOSB;

(ii) It, together with its affiliates, is small under the size standard corresponding to the NAICS code assigned to the procurement;

(iii) It will comply with the applicable limitations on subcontracting during performance of the contract, as set forth in § 125.6 of this chapter.

(2) *Prior to identification as apparent successful offeror.* (i) Prior to being identified as an apparent successful offeror for a VOSB or SDVOSB contract, the certified VOSB or SDVOSB partner to the joint venture must submit a certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(A) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section;

(B) The parties will perform the contract in compliance with the joint venture agreement and with the limitations on subcontracting requirements set forth in paragraph (e)(2)(i)(A) of this section.

(ii) Although the managing venturer must be a certified VOSB or SDVOSB as of the date of the joint venture's initial offer which includes price in order for the joint venture to qualify as an eligible VOSB or SDVOSB, the joint venture must meet the joint venture agreement requirements set forth in paragraph (c) of this section at the time the joint venture is identified as an apparent successful offeror.

(f) *Capabilities, past performance, and experience.* When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for a VOSB or SDVOSB contract as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the certified VOSB or SDVOSB to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate

must demonstrate the past performance, experience, business systems, and certifications necessary to perform the contract.

(g) *Contract execution.* The procuring activity will execute a VOSB or SDVOSB contract in the name of the joint venture entity or the certified VOSB or SDVOSB, but in either case will identify the award as one to a VOSB or SDVOSB joint venture or a VOSB or SDVOSB mentor-protégé joint venture, as appropriate.

(h) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(i) *Performance of work reports.* A certified VOSB or SDVOSB partner to a joint venture must describe how it is meeting or has met the applicable performance of work requirements for each VOSB or SDVOSB contract it performs as a joint venture.

(1) The certified VOSB or SDVOSB partner to the joint venture must annually submit a report to the relevant contracting officer and to SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements are being met.

(2) At the completion of every VOSB or SDVOSB contract awarded to a joint venture, the certified VOSB or SDVOSB partner to the joint venture must submit a report to the relevant contracting officer and to SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (b)(2) of this section.

(3) Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

(j) *Basis for suspension or debarment.* The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (b)(2) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or limitations on subcontracting requirements in paragraph (b)(3) of this section; or

(3) Failure to submit the certification required by paragraph (b)(4) of this section or comply with paragraph (b)(7) of this section.

§ 128.403 What requirements are not available for VOSB or SDVOSB contracts?

For VA procurements, a contracting officer may award a VOSB or SDVOSB contract as set forth in the VAAR. For non-VA SDVOSB contracts, a contracting activity may not make a requirement available for a SDVOSB contract if:

(a) The contracting activity otherwise would fulfill that requirement through award to Federal Prison Industries, Inc. under 18 U.S.C. 4124 or 4125, or to Javits-Wagner-O'Day Act participating non-profit agencies for the blind and severely disabled, under 41 U.S.C. 8501 *et seq.*, as amended; or

(b) An 8(a) BD program participant currently is performing that requirement or SBA has accepted that requirement for performance under the authority of the section 8(a) BD program, unless SBA has consented to release of the requirement from the section 8(a) BD program.

§ 128.404 When may a contracting officer set aside a procurement for VOSBs or SDVOSBs?

(a) *VA procurements.* For VA procurements, a contracting officer may set aside a contract for a VOSB or SDVOSB as set forth in the VAAR. For non-VA procurements, the contracting officer first must review a requirement to determine whether it is excluded from SDVOSB contracting pursuant to § 128.403.

(b) *Contracting among small business programs—(1) Acquisitions valued at or below the simplified acquisition threshold.* For VA procurements, a contracting officer may award at or below the simplified acquisition threshold as set forth in the VAAR. For non-VA procurements, the contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the micro-purchase threshold but not exceeding the simplified acquisition threshold (defined in the FAR at 48 CFR 2.101) for small business concerns, regardless of the place of performance, when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. The requirement in this paragraph (b)(1) does not preclude a contracting officer from making an award to a small business under the 8(a) BD, Historically Underutilized Business Zone (HUBZone), SDVOSB, or WOSB Programs.

(2) *Acquisitions valued above the simplified acquisition threshold.* (i) For VA procurements, a contracting officer may award above the simplified acquisition threshold as set forth in the VAAR. For non-VA procurements, the contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the simplified acquisition threshold (defined in the FAR at 48 CFR 2.101) for small business concerns, regardless of the place of performance, when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the

8(a) BD, HUBZone, SDVOSB, or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVOSB, or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's certifications in the System for Award Management (SAM) (or any successor system) and associated representations were reviewed.

(ii) SBA believes that progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.

(c) *SDVOSB set-asides*. If the contracting officer decides to set aside the requirement for competition restricted to SDVOSBs, the contracting officer must:

(1) Have a reasonable expectation that at least two responsible SDVOSBs will submit offers; and

(2) Determine that the award can be made at fair market price.

(d) *Prohibition on combined set-asides*. A procuring activity cannot restrict an SDVOSB competition (for either a contract or order) to require certifications other than SDVOSB certification (i.e., a competition cannot be limited only to business concerns that are both SDVOSB and 8(a), SDVOSB and HUBZone, or SDVOSB and WOSB).

§ 128.405 When may a contracting officer award a sole source contract to a VOSBs or SDVOSB?

For VA procurements, a contracting officer may award a sole source contract to a VOSB or SDVOSB as set forth in the VAAR. A contracting officer may award a sole

source contract to an SDVOSB for non-VA procurements only when the contracting officer determines that:

- (a) None of the provisions of § 128.403 or § 128.404 apply;
- (b) The anticipated award price of the contract, including options, will not exceed:
 - (1) \$7,000,000 for a contract assigned a manufacturing NAICS code; or
 - (2) \$4,000,000 for all other contracts;
- (c) A SDVOSB is a responsible contractor able to perform the contract; and
- (d) Contract award can be made at a fair and reasonable price.

§ 128.406 Are there VOSB or SDVOSB contracting opportunities at or below the simplified acquisition threshold?

(a) For VA procurements, a contracting officer may award at or below the simplified acquisition threshold as set forth in the VAAR.

(b) For non-VA procurements, if a SDVOSB requirement is at or below the simplified acquisition threshold, the contracting officer may set aside the requirement for consideration among SDVOSBs using simplified acquisition procedures or may award a sole source contract to an SDVOSB.

§ 128.407 May SBA appeal a contracting officer's decision not to make a procurement available for award as a SDVOSB contract?

The SBA Administrator may appeal a contracting officer's decision not to make a particular requirement available for award as an SDVOSB sole source or a SDVOSB set-aside contract at or above the simplified acquisition threshold.

§ 128.408 What is the process for such an appeal?

(a) *Notice of appeal.* When the contracting officer rejects a recommendation by SBA's Procurement Center Representative to make a requirement available for award as an SDVOSB contract, the contracting officer must notify the Procurement Center Representative as soon as practicable. If the SBA Administrator intends to appeal the

decision, SBA must notify the contracting officer no later than five business days after receiving notice of the contracting officer's decision.

(b) *Suspension of action.* Upon receipt of notice of SBA's intent to appeal, the contracting officer must suspend further action regarding the procurement until the Secretary of the department or head of the agency issues a written decision on the appeal, unless the Secretary of the department or head of the agency makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States compel award of the contract.

(c) *Deadline for appeal.* Within 15 business days of SBA's notification to the contracting officer, SBA must file its formal appeal with the Secretary of the department or head of the agency, or the appeal will be deemed withdrawn.

(d) *Decision.* The Secretary of the department or head of the agency must specify in writing the reasons for a denial of an appeal brought under this section.

Subpart E - Protests Concerning VOSBs and SDVOSBs

§ 128.500 What are the requirements for filing a VOSB or SDVOSB status protest?

(a) All challenges to the inclusion in the certification database of a VOSB or SDVOSB based on the status of the concern as a small business concern or the ownership or control of the concern, shall be heard by the Office of Hearings and Appeals of the Small Business Administration in accordance with part 134 of this chapter. The decision of the Office of Hearings and Appeals shall be considered final agency action.

(b) The protest procedures described in part 134 of this chapter are separate from those governing size protests and appeals. All protests relating to whether an eligible VOSB or SDVOSB is a small business for purposes of any Federal program are subject to part 121 of this chapter and must be filed in accordance with that part. If a protester protests both the size of the VOSB or SDVOSB and whether the concern meets the VOSB or SDVOSB requirements set forth in § 128.200, SBA will process each protest

concurrently under the procedures set forth in parts 121 and 134 of this chapter. SBA does not review issues concerning the administration of a VOSB or SDVOSB contract.

(c) When challenging the SDVOSB status of a joint venture, the managing SDVOSB party to the joint venture must be a certified SDVOSB as of the date of the joint venture's initial offer, including price, for the SDVOSB contract and compliance with the joint venture agreement requirements set forth in § 128.402(c) is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding.

Subpart F - Penalties and Retention of Records

§ 128.600 What are the requirements for representing VOSB or SDVOSB status, and what are the penalties for misrepresentation?

(a) *Presumption of loss based on the total amount expended.* In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to VOSBs or SDVOSBs, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a VOSB or SDVOSB willfully sought and received the award by misrepresentation.

(b) *Deemed certifications.* The following actions shall be deemed affirmative, willful, and intentional certifications of VOSB or SDVOSB status:

(1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to VOSBs or SDVOSBs.

(2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a VOSB or SDVOSB.

(3) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a VOSB or SDVOSB.

(c) *Signature requirement.* Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the VOSB or, in the case of an SDVOSB, SDVOSB status of a business concern seeking the Federal contract, subcontract, or grant. An authorized official must sign the certification on the same page containing the SDVOSB status claimed by the concern.

(d) *Limitation of liability.* Paragraphs (a) through (c) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of VOSB or SDVOSB status was not affirmative, intentional, willful, or actionable under the False Claims Act, 31 U.S.C. 3729, *et seq.* A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' VOSB or SDVOSB status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing VOSB or SDVOSB status representations or certifications, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where Government personnel have erroneously identified a concern as a VOSB or SDVOSB without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

(e) *Penalties for misrepresentation—(1) Suspension or debarment.* The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for misrepresenting a firm's status as a VOSB or SDVOSB pursuant to the procedures set forth in 48 CFR part 9, subpart 9.4.

(2) *Civil penalties.* Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, the Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812, and any other applicable laws or regulations, including part 142 of this chapter.

(3) *Criminal penalties.* Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the VOSB or SDVOSB status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct “continuing representations” that are no longer true.

Subpart G - Surplus Personal Property for Veteran-Owned Small Business Programs

§ 128.700 How does a VOSB obtain Federal surplus personal property?

(a) *General.* (1) Pursuant to 15 U.S.C. 657b(g), eligible small business concerns owned and controlled by veterans may receive surplus Federal Government property from State Agencies for Surplus Property (SASPs). The procedures set forth in 41 CFR part 102-37 and this section will be used to transfer surplus personal property to such concerns.

(2) The surplus personal property which may be transferred to SASPs for further transfer to eligible small business concerns owned and controlled by veterans includes all

surplus personal property which has become available for donation pursuant to 41 CFR 102-37.30.

(b) *Eligibility to receive Federal surplus personal property.* To be eligible to receive Federal surplus personal property, on the date of transfer a concern must:

(1) Be a small business concern owned and controlled by veterans, that has been certified by SBA under this part;

(2) Not be debarred, suspended, or declared ineligible under title 2 or title 48 of the CFR; and

(3) Be engaged or expect to be engaged in business activities making the item useful to it.

(c) *Use of acquired surplus personal property.* (1) Eligible concerns may acquire Federal surplus personal property from the SASP in the state(s) where the concern is located and operates, provided the concern represents and agrees in writing:

(i) As to what the intended use of the surplus personal property is to be;

(ii) That it will use the surplus personal property to be acquired in the normal conduct of its business activities or be liable for the fair rental value from the date of its receipt;

(iii) That it will not sell or transfer the surplus personal property to be acquired to any party other than the Federal Government as required by General Services Administration (GSA) and SASP requirements and guidelines;

(iv) That, at its own expense, it will return the surplus personal property to a SASP if directed to do so by SBA, including where the concern has not used the property as intended within one year of receipt;

(v) That, should it breach its agreement not to sell or transfer the surplus personal property, it will be liable to the Federal Government for the established fair market value or the sale price, whichever is greater, of the property sold or transferred; and

(vi) That it will give GSA and the SASP access to inspect the surplus personal property and all records pertaining to it.

(2) A concern receiving surplus personal property pursuant to this section assumes all liability associated with or stemming from the use of the property, and all costs associated with the use and maintenance of the property.

(d) *Costs.* Concerns acquiring surplus personal property from a SASP may be required to pay a service fee to the SASP in accordance with 41 CFR 102-37.280. In no instance will any SASP charge a concern more for any service than their established fees charged to other transferees.

(e) *Title.* Upon execution of the SASP distribution document, the firm receiving the property has only conditional title to the property during the applicable period of restriction. Full title to the property will vest in the recipient concern only after the recipient concern has met all of the requirements of this part and the requirements of GSA and the SASP that it received the property from.

PART 134 - RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

9. The authority citation for part 134 is revised to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 634(i), 637(a), 648(l), 656(i), 657t and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Subpart J issued under 15 U.S.C. 657f.

Subpart K issued under 15 U.S.C. 657f.

Subpart L issued under 15 U.S.C. 636(a)(36); 15 U.S.C. 636(a)(37); 15 U.S.C. 636m.

10. Amend § 134.102 by removing and reserving paragraph (q) and revising paragraphs (u) and (v).

The revisions read as follows:

§ 134.102 Jurisdiction of OHA.

* * * * *

(u) Protests of eligibility for inclusion in the Veteran Small Business Certification Program;

(v) Appeals of denials of certification in and decertification from the Veteran Small Business Certification Program; and

* * * * *

11. Amend § 134.201 by removing and reserving paragraph (b)(3) and revising paragraphs (b)(8) and (9).

The revisions read as follows:

§ 134.201 Scope of the rules in this subpart.

* * * * *

(b) * * *

(8) For protests of eligibility for inclusion in the Veteran Small Business Certification Program, in subpart J of this part;

(9) For appeals of denials of certification and decertification in the Veteran Small Business Certification Program, in subpart K of this part; and

* * * * *

Subpart E—[Removed and Reserved]

12. Remove and reserve subpart E, consisting of §§ 134.501 through 134.515.

13. Revise subparts J and K to read as follows:

Subpart J - Rules of Practice for Protests of Eligibility for Inclusion in the SBA

Veteran Small Business Certification Program Database (VOSB or SDVOSB Status Protests)

Sec.

134.1001	Scope of rules.
134.1002	Who may file a VOSB or SDVOSB status protest?
134.1003	Grounds for filing a VOSB or SDVOSB status protest.
134.1004	Commencement of VOSB or SDVOSB status protests.
134.1005	Contents of the VOSB or SDVOSB status protest.
134.1006	Service and filing requirements.
134.1007	Processing a VOSB or SDVOSB status protest.

134.1008	Discovery.
134.1009	Oral hearings.
134.1010	Standard of review and burden of proof.
134.1011	Weight of evidence.
134.1012	The record.
134.1013	Request for reconsideration.

Subpart J - Rules of Practice for Protests of Eligibility for Inclusion in the SBA

Veteran Small Business Certification Program Database (VOSB or SDVOSB Status Protests)

§ 134.1001 Scope of rules.

(a) The rules of practice in this subpart apply to VOSB or SDVOSB status protests. A VOSB or SDVOSB status protest is the process by which an interested party (*see* § 134.1002(b)) may challenge a concern's inclusion in the SBA Veteran Small Business Certification Program database or the VOSB or SDVOSB status of an apparent successful offeror on a VOSB or SDVOSB contract, including a joint venture submitting an offer under § 128.402 of this chapter. OHA will also consider a protest challenging whether a prime contractor is unduly reliant on a small, non-similarly situated entity subcontractor or if such subcontractor performs the primary and vital requirements of the contract.

(b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to protests listed in paragraph (a) of this section.

(c) The protest procedures described in this subpart are separate from those governing size protests and size appeals. All protests relating to whether a VOSB or SDVOSB is a "small" business for purposes of any Federal program are subject to part 121 of this chapter and must be filed in accordance with that part. If a protester protests both the size of a VOSB or SDVOSB and the concern's eligibility for the SBA Veteran Small Business Certification Program, SBA will process each protest concurrently, under

the procedures set forth in part 121 of this chapter and this part. SBA does not review issues concerning the administration of a VOSB or SDVOSB contract.

(d) Appeals of denials and cancellations of certification for inclusion in the Veteran Small Business Certification Program are governed by subpart K of this part.

§ 134.1002 Who may file a VOSB or SDVOSB status protest?

(a) For sole source procurements, SBA, VA, or the contracting officer may protest the proposed awardee's VOSB or SDVOSB status.

(b) For all other procurements, any interested party may protest the apparent successful offeror's VOSB or SDVOSB status. An interested party means the contracting officer, SBA, VA, any concern that submits an offer for a specific set-aside VOSB or SDVOSB contract (including Multiple Award Contracts) or order, or any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a reserve of an award given to a VOSB or SDVOSB.

(c) SBA and VA may file a VOSB or SDVOSB status protest at any time.

§ 134.1003 Grounds for filing a VOSB or SDVOSB status protest.

(a) *Veteran status.* In cases where the protest is based on service-connected disability, permanent and severe disability, or veteran status, the Judge will only consider a protest that presents specific allegations supporting the contention that the owner(s) cannot provide documentation from the VA, Department of Defense, or the U.S. National Archives and Records Administration to show that they meet the definition of veteran, service-disabled veteran, or service-disabled veteran with a permanent and severe disability.

(b) *Ownership and control.* In cases where the protest is based on ownership and/or control, the Judge will consider a protest only if the protester presents credible evidence that the concern is not 51% owned and controlled by one or more veterans or service-disabled veterans.

(c) *Ostensible subcontractor.* In cases where the protest is based on an allegation that the prime contractor appears unduly reliant on one or more, non-VOSB or non-SDVOSB subcontractors, or the non-VOSB or non-SDVOSB subcontractor is performing the primary and vital requirements of the contract, OHA will consider a protest only if the protester presents credible evidence of the alleged undue reliance or credible evidence that the primary and vital requirements will be performed by the subcontractor(s).

(d) *Joint ventures.* A VOSB or SDVOSB joint venture may be protested regarding the status of the managing VOSB or SDVOSB joint venture partner or for failure to meet the requirements of § 128.402 of this chapter. If the joint venture is found to be ineligible solely based on failure to meet the requirements of that section, the joint venture will be ineligible for the contract at issue. The finding of ineligibility is limited to that contract and will not affect the underlying eligibility of the VOSB or SDVOSB joint venture partner.

(e) *Date for determining eligibility.* (1) If the VOSB or SDVOSB status protest pertains to a procurement, the Judge will determine a protested concern's eligibility as a VOSB or SDVOSB as of the date of its initial offer or response which includes price. For a protest challenging an ostensible subcontractor or a joint venture's compliance with the joint venture agreement requirements set forth in § 128.402(c), the Judge will determine eligibility as of the date of the final proposal revision for negotiated acquisitions or as of final bid for sealed bidding.

(2) If the VOSB or SDVOSB status protest does not pertain to a procurement, the Judge will determine a protested concern's eligibility as a VOSB or SDVOSB as of the date the VOSB or SDVOSB status protest was filed.

§ 134.1004 Commencement of VOSB or SDVOSB status protests.

(a) *Timeliness.* (1) The Secretary of the VA (or designee) or SBA may file a VOSB or SDVOSB status protest at any time.

(2) The contracting officer, SBA, or VA may file a VOSB or SDVOSB status protest at any time after the apparent awardee has been identified or after bid opening, whichever applies.

(3) For negotiated acquisitions, an interested party (*see* §134.1002(b)) must submit its protest by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.

(i) Except for an order or Blanket Purchase Agreement issued under a Federal Supply Schedule contract, for an order or Agreement that is set-aside for VOSBs or SDVOSBs under a multiple award contract that was not itself set aside or reserved for VOSBs or SDVOSBs, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order or Agreement.

(ii) Where a contracting officer has required offerors for a specific order under a multiple award VOSB or SDVOSB contract to recertify their VOSB or SDVOSB status, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order.

(4) For sealed bid acquisitions, a protest from an interested party (*see* §134.1002(b)) must be received by close of business on the fifth business day after bid opening. Where the identified low bidder is determined to be ineligible for award, a protest of any other identified low bidder must be received prior to the close of business on the 5th business day after the contracting officer has notified interested parties of the identity of that low bidder.

(5) The rule for counting days is in § 134.202(d).

(6) Any protest received after the time limit is untimely, unless it is from SBA, VA, or the contracting officer. An untimely protest will be dismissed.

(b) *Filing.* (1) An interested party, other than SBA, VA, or the contracting officer, must deliver a VOSB or SDVOSB status protest to the contracting officer in person, by email, facsimile, by express delivery service, or by U.S. mail (postmarked within the applicable time period) to the contracting officer.

(2) VA, SBA, or the contracting officer must submit a VOSB or SDVOSB status protest directly to OHA in accordance with the procedures in § 134.204. The protest should include in the referral letter the information set forth in paragraph (c) of this section.

(3) SBA must submit a VOSB or SDVOSB status protest directly to OHA in accordance with the procedures in § 134.204.

(c) *Referral to OHA.* The contracting officer must forward to OHA any VOSB or SDVOSB status protest received, notwithstanding whether the contracting officer believes it is premature, sufficiently specific, or timely. The contracting officer must send all VOSB or SDVOSB status protests, along with a referral letter, directly to OHA, addressed to Office of Hearings and Appeals, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416, or by email at OHAfilings@sba.gov, marked “Attn: VOSB Status Protest” or “Attn: SDVOSB Status Protest”. The referral letter must include information pertaining to the solicitation that may be necessary for OHA to determine timeliness and standing, including:

(1) The solicitation number;

(2) The name, address, telephone number, and email address of the contracting officer;

(3) Whether the contract was a sole source or set-aside VOSB or SDVOSB procurement;

- (4) Whether the protester submitted an offer;
- (5) Whether the protested concern was the apparent successful offeror;
- (6) Whether the procurement was conducted using sealed bid or negotiated procedures;
- (7) The bid opening date, if applicable;
- (8) When the protested concern submitted its initial offer which included price;
- (9) When the protest was submitted to the contracting officer;
- (10) When the protester received notification of the apparent successful offeror, if applicable; and
- (11) Whether a contract has been awarded.

§ 134.1005 Contents of the VOSB or SDVOSB status protest.

(a) VOSB and SDVOSB status protests must be in writing. There is no required format for a VOSB or SDVOSB status protest, but it must include the following:

- (1) The solicitation or contract number, if applicable;
- (2) Specific allegations supported by credible evidence that the concern (or joint venture) does not meet the VOSB or SDVOSB eligibility requirements listed in part 128 of this chapter;
- (3) Any other pertinent information the Judge should consider; and
- (4) The name, address, telephone number, and email address, if available, and signature of the protester or its attorney.

(b) If the protester intends to seek access to the SBA case file under § 134.205, the protester should include in its protest a request for a protective order. Unless good cause is shown, a protester must request a protective order within five days of filing the protest.

§ 134.1006 Service and filing requirements.

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart.

§ 134.1007 Processing a VOSB or SDVOSB status protest.

(a) *Notice and order.* If the Judge determines that the protest is timely, sufficiently specific, and based upon protestable allegations, the Judge will issue a notice and order, notifying the protester, the protested concern, the Director, Office of Government Contracting (D/GC), SBA Counsel, and, if applicable, the contracting officer of the date OHA received the protest, and order a due date for responses.

(b) *Dismissal of protest.* If the Judge determines that the protest is premature, untimely, nonspecific, or is based on non-protestable allegations, the Judge will dismiss the protest and will send the contracting officer, D/GC, SBA's Associate General Counsel for Procurement Law, and the protester a notice of dismissal, citing the reason(s) for the dismissal. The dismissal is a final agency action.

(c) *Transmission of the case file.* Upon receipt of a notice and order, the D/GC must deliver to OHA the entire case file relating to the protested concern's inclusion in the certification database. The notice and order will establish the timetable for transmitting the case file to OHA. The D/GC must certify and authenticate that the case file, to the best of his/her knowledge, is a true and correct copy of the case file.

(d) *Protective order.* A protester seeking access to the SBA case file must file a timely request for a protective order under § 134.205. Except for good cause shown, a protester must request a protective order within five days of filing the protest. Even after issuance of a protective order, OHA will not disclose income tax returns or privileged information.

(e) *Supplemental allegations.* If, after viewing documents in the SBA case file for the first time under a protective order, a protester wishes to supplement its protest with

additional argument, the protester may do so. Any such supplement is due at OHA no later than 15 days from the date the protester receives or reviews the SBA case file.

(f) *Response*—(1) *Timing*. The protested concern, the D/GC, the contracting officer, and any other interested party (*see* §134.1002(b)) may respond to the protest and supplemental protest, if one is filed. The response is due no later than 15 days from the date the protest or supplemental protest was filed with OHA. The record closes the date the final response is due.

(2) *Service*. The respondent must serve its response upon the protester or its counsel and upon each of the persons identified in the certificate of service attached to the notice and order or, if a protective order is issued, in accordance with the terms of the protective order.

(3) *Reply to a response*. No reply to a response will be permitted unless the Judge directs otherwise.

(g) *Basis for decision*. The decision will be based primarily on the case file and information provided by the protester, the protested concern, and any other parties. However, the Judge may investigate issues beyond those raised in the protest and may use other information or make requests for additional information to the protester, the protested concern, or SBA.

(h) *Award of contract*. The contracting officer may award a contract before the Judge issues a decision only if the contracting officer determines that an award must be made to protect the public interest and notifies the Judge and D/GC in writing of such determination. Notwithstanding such a determination, the provisions of paragraph (j) of this section shall apply to the procurement in question.

(i) *Decision*. OHA will serve a copy of the written decision on each party, or, if represented by counsel, on its counsel. The decision is considered the final agency action, and it becomes effective upon issuance.

(j) *Effect of decision.* (1) A contracting officer may award a contract to a protested concern after the Judge has sustained the protest and determined either that the protested concern is an eligible VOSB or SDVOSB , and no OHA appeal has been filed, or has dismissed all protests against it.

(2) A contracting officer shall not award a contract to a protested concern that the Judge has determined is not an eligible VOSB or SDVOSB. If the contract has already been awarded, then the awarded contract shall be deemed void *ab initio* (invalid from the outset), and the contracting officer shall rescind the contract and award the contract to the next eligible concern in line for the award.

(3) The contracting officer must update the Federal Procurement Data System (or successor system) and other procurement reporting databases to reflect the Judge's decision.

(4) If the Judge finds the protested concern is not an eligible VOSB or SDVOSB, the D/GC must immediately remove the protested concern from the certification database.

(5) A concern found to be ineligible may not submit an offer on a future VOSB or SDVOSB procurement until the protested concern reapplies to the Veteran Small Business Certification Program and has been designated by SBA as a VOSB or SDVOSB into the certification database.

§ 134.1008 Discovery.

Discovery will not be permitted in SBA VOSB or SDVOSB status protest proceedings.

§ 134.1009 Oral hearings.

Oral hearings will be held in VOSB or SDVOSB status protest proceedings only upon a finding by the Judge of extraordinary circumstances. If such an oral hearing is

ordered, the proceeding shall be conducted in accordance with those rules of subpart B of this part as the Judge deems appropriate.

§ 134.1010 Standard of review and burden of proof.

The protested concern has the burden of proving its eligibility, by a preponderance of the evidence.

§ 134.1011 Weight of evidence.

The Judge will give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions. In the case of refusal or failure to furnish requested information within a required time period, the Judge may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

§ 134.1012 The record.

Where relevant, the provisions of § 134.225 apply. In a protest under this subpart, the contents of the record also include the case file or solicitation submitted to OHA in accordance with § 134.1007.

§ 134.1013 Request for reconsideration.

The decision on a VOSB or SDVOSB status protest may not be appealed.
However:

(a) The Judge may reconsider a VOSB or SDVOSB status protest decision. Any party that has appeared in the proceeding, or the SBA, may request reconsideration by filing with OHA and serving a petition for reconsideration on all the parties to the VOSB or SDVOSB status protest within twenty (20) calendar days after service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. The Judge may also reconsider a decision on his or her own initiative.

(b) If the Judge reverses his or her initial decision on reconsideration, the contracting officer must follow § 134.1007(j) in applying the new decision's results.

Subpart K - Rules of Practice for Appeals of Denials of Certification and Decertification in the SBA Veteran Small Business Certification Program (VOSB or SDVOSB Appeals)

Sec.

- 134.1101 Scope of rules.
- 134.1102 Who may file a VOSB or SDVOSB Appeal?
- 134.1103 Grounds for filing a VOSB or SDVOSB Appeal.
- 134.1104 Commencement of a VOSB or SDVOSB Appeal.
- 134.1105 The appeal petition.
- 134.1106 Service and filing requirements.
- 134.1107 Transmission of the case file.
- 134.1108 Response to an appeal petition.
- 134.1109 Discovery and oral hearings.
- 134.1110 New evidence.
- 134.1111 Standard of review and burden of proof.
- 134.1112 The decision.

Subpart K - Rules of Practice for Appeals of Denials of Certification and Decertification in the SBA Veteran Small Business Certification Program (VOSB or SDVOSB Appeals)

§ 134.1101 Scope of rules.

(a) The rules of practice in this subpart apply to appeals of denial of certification and decertification for inclusion in the SBA Veteran Small Business Certification Program certification database (VOSB or SDVOSB Appeals).

(b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to appeals listed in paragraph (a) of this section.

(c) Protests of a concern's eligibility for inclusion in the SBA Veteran Small Business Certification Program Database (VOSB or SDVOSB Status Protests) are governed by subpart J of this part.

§ 134.1102 Who may file a VOSB or SDVOSB Appeal?

A concern that has been denied certification as a VOSB or SDVOSB or has had its VOSB or SDVOSB status decertified may appeal the decision to OHA.

§ 134.1103 Grounds for filing a VOSB or SDVOSB Appeal.

Denial of certification and decertification of VOSB or SDVOSB status may be appealed to OHA. A denial or decertification based on the failure to provide sufficient evidence of the qualifying individual's status as a veteran or a service-disabled veteran are final VA decisions and not subject to appeal to OHA.

§ 134.1104 Commencement of VOSB or SDVOSB Appeal.

(a) A concern whose application for VOSB or SDVOSB certification has been denied or whose status has been decertified must file its appeal within 10 business days of receipt of the denial or decertification.

(b) The rule for counting days is in § 134.202(d).

(c) OHA will dismiss an untimely appeal.

§ 134.1105 The appeal petition.

(a) *Format.* VOSB or SDVOSB appeals must be in writing. There is no required format for an appeal petition; however, it must include the following:

- (1) A copy of the denial or decertification and the date the appellant received it;
- (2) A statement of why the denial or decertification is in error;
- (3) Any other pertinent information the Judge should consider; and
- (4) The name, address, telephone number, and email address, if available, and signature of the appellant or its attorney.

(b) *Service.* The appellant must serve copies of the entire appeal petition upon the Director, Office of Government Contracting (D/GC) and SBA Counsel at OPLservice@sba.gov.

(c) *Certificate of service.* The appellant must attach to the appeal petition a signed certificate of service meeting the requirements of § 134.204(d).

(d) *Dismissal.* An appeal petition that does not meet all the requirements of this section may be dismissed by the Judge at his/her own initiative or upon motion of a respondent.

§ 134.1106 Service and filing requirements.

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart.

§ 134.1107 Transmission of the case file.

Once a VOSB or SDVOSB appeal is filed, the D/GC must deliver to OHA the entire case file relating to the denial or decertification. The Judge will issue a notice and order establishing the timetable for transmitting the case file to OHA. The D/GC must certify and authenticate that the case file, to the best of his/her knowledge, is a true and correct copy of the case file.

§ 134.1108 Response to an appeal petition.

(a) *Who may respond.* The D/GC (or designee) or counsel for SBA may respond to the VOSB or SDVOSB appeal. The response should present arguments to the issues presented on appeal.

(b) *Time limits.* The notice and order will inform the parties of the filing of the appeal petition, establish the close of record as 15 days after service of the notice and order, and inform the parties that OHA must receive any responses to the appeal petition no later than the close of record.

(c) *Service.* The respondent must serve its response upon the appellant and upon each of the persons identified in the certificate of service attached to the appeal petition pursuant to § 134.1105.

(d) *Reply to a response.* No reply to a response will be permitted unless the Judge directs otherwise.

§ 134.1109 Discovery and oral hearings.

Discovery will not be permitted and oral hearings will not be held.

§ 134.1110 New evidence.

Except for good cause shown, evidence beyond the case file will not be admitted.

§ 134.1111 Standard of review and burden of proof.

The standard of review is whether the D/GC denial or decertification was based on clear error of fact or law. The appellant has the burden of proof, by a preponderance of the evidence.

§ 134.1112 The decision.

(a) *Timing.* The Judge shall decide a VOSB or SDVOSB Appeal, insofar as practicable, within 60 calendar days after close of the record.

(b) *Contents.* Following closure of the record, the Judge will issue a decision containing findings of fact and conclusions of law, reasons for such findings and conclusions, and any relief ordered.

(c) *Basis for decision.* Decisions under this subpart will be based primarily on the evidence in the SBA case file, arguments made on appeal, and any response(s) thereto. However, the Judge, in his/her sole discretion, may consider issues beyond those raised in the pleadings and the denial or cancellation letter.

(d) *Finality.* The decision is the final agency decision and becomes effective upon issuance. Where OHA dismisses an appeal of a D/GC denial or decertification, the D/GC determination remains in effect.

(e) *Service.* OHA will serve a copy of all written decisions on each party, or, if represented by counsel, on its counsel.

(f) *Effect.* If the Judge grants the appeal and finds the appellant eligible for inclusion in the SBA certification database, the D/GC must immediately include in the SBA certification database.

(g) *Reconsideration.* A decision of the Judge may be reconsidered. Any party that has appeared in the proceeding, or the SBA Administrator or his or her designee, may request reconsideration by filing with OHA and serving a petition for reconsideration on all parties to the VOSB or SDVOSB Appeal within twenty (20) calendar days after

service of the written decision, upon a clear showing of an error of fact or law material to the decision. The Judge also may reconsider a decision on his or her own initiative.

Isabella Casillas Guzman,
Administrator.

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